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MEMORANDUM TO: Joseph Spetrini
Acting Assistant Secretary
For Import Administration

FROM: Barbara Tillman
Acting Deputy Assistant Secretary
for Import Administration, Group III

SUBJECT: Issues and Decision Memorandum for the Administrative Review of
Certain Stainless Steel Wire Rods from India for the Period of Review
Covering December 1, 2000 through November 30, 2001

SUMMARY

We have analyzed the comment and rebuttal briefs of interested parties in the 2000-2001 administrative review of the antidumping duty order covering certain stainless steel wire rods (“SSWR”) from India. As a result of our analysis, we have made changes to the margin calculations. We recommend that you approve the positions we have developed in the “Discussion of the Issues” section of this memorandum. Below is the complete list of the issues in this administrative review for which we received comment and rebuttal briefs by interested parties.

BACKGROUND

On January 8, 2003, the Department of Commerce (“the Department”) published the preliminary results and partial rescission of its administrative review of the antidumping duty order on stainless steel wire rods from India. See Stainless Steel Wire Rods From India: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review, 68 FR 1040 (January 8, 2003) (“Preliminary Results”). The merchandise covered by this order is stainless steel wire rods, as described in the “Scope of the Review” section of the Federal Register notice of these final results of review. Id. The period of review (“POR”) is December 1, 2000 through November 30, 2001. The petitioner is Carpenter Technology Corporation (“petitioner”). The respondents are Panchmahal Steel, Ltd. (“Panchmahal”), Mukand Limited (“Mukand”), and the Viraj Group, Ltd. (“Viraj Group”). Isibars Limited (“Isibars”) was originally a respondent in this review, but the Department rescinded the review of Isibars when petitioner, being the only party to request the review of Isibars, timely withdrew its request for review. See Preliminary Results. We invited parties to comment on our Preliminary Results of review. Id.

We received case briefs from Panchmahal on February 14, 2003, referencing arguments made in its submissions to the Department dated January 6, 2003 and January 13, 2003. On February 11, 2003, Kurt Orban Partners LLC (“Kurt Orban”), an interested party, submitted a case brief. Pursuant to a request from the Department to redact new information, Kurt Orban resubmitted its case brief on March 13, 2003. We received Mukand’s case briefs on January 13, 2003, and February 14, 2003. We received the Viraj Group’s case brief on February 14, 2003. We received petitioner’s case briefs addressing Mukand and the Viraj Group on February 14, 2003. On February 24, 2003, we received rebuttal briefs from the Viraj Group and from petitioner addressing the arguments presented by Panchmahal, Mukand, and the Viraj Group. Pursuant to 19 CFR Section 351.309(c)(ii), the Department directed the Viraj Group to resubmit their brief and omit certain arguments that were not raised in a timely manner. See the Department’s letter dated March 26, 2003 rejecting the Viraj Group’s case brief. The Viraj Group resubmitted their case brief on March 31, 2003. On April 15, 2003, Kurt Orban met with the Department to discuss Panchmahal’s cost reconciliation. See the Department’s memorandum to the file dated April 16, 2003. We have now completed the administrative review in accordance with section 751 of the Tariff Act of 1930, as amended (“the Act”).

A. Issues with Respect to Panchmahal

Comment 1. Use of Facts Available

B. Issues with Respect to Mukand

- Comment 2. Consignment/Agency Sales
- Comment 3. Use of Facts Available
- Comment 4. Interest Expense
- Comment 5. Sales Overhead Expenses
- Comment 6. Treatment of Unrefunded Taxes
- Comment 7. Import Duties
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C. Issues with Respect to the Viraj Group

- Comment 9. The Viraj Group’s Cost Data
- Comment 10. Collapsing the Viraj Group
- Comment 11. Financial Expenses of Viraj Group
- Comment 12. Raw Material Cost
- Comment 13. Non-Dumped Sales
- Comment 14. Ministerial Errors

I. Changes Since the Preliminary Results

The Viraj Group

- The Department has revised the Viraj Group's total cost of manufacturing to reflect the actual direct material cost incurred for purchasing billets. See, Comment 14 below.

Mukand

- The Department has reclassified some of Mukand's U.S. sales as agency sales. See, Comment 2 below.
- The Department revised Mukand's interest expense ratio to exclude certain capitalized expenses related to the construction of a non-subject merchandise producing plant. See, Comment 4 below.
- The Department revised Mukand's general and administrative expenses ("G&A") ratio to exclude certain indirect selling expenses. As a result, the Department has also recalculated Mukand's indirect selling expenses to account for the reclassification. See, Comment 5 below.
- The Department revised Mukand's U.S. direct expenses to exclude certain taxes already reported as a part of its direct material costs. See, Comment 6 below.
- The Department revised Mukand's packing costs in order to account for an improper currency conversion in the preliminary margin calculation program. See, Comment 8 below.

II. DISCUSSION OF THE ISSUES

A. Issues with Respect to Panchmahal

Comment 1: Facts Available

Panchmahal argues that the Department should not have applied the 48.80 percent "all others" rate as adverse facts available to calculate the dumping margin for Panchmahal in the Preliminary Results, because its conduct during this review does not warrant the use of adverse facts available. Nonetheless, even if the Department should apply facts available, Panchmahal asserts that the record and the law do not justify using an adverse inference.

Panchmahal argues that its inability to complete the requested cost reconciliations in the time and manner requested by the Department is excusable because it is a small company with limited resources and limited sales. Panchmahal believes that the pre-verification demands concerning cost reconciliations placed on it by the Department were greater than the demands placed on similar respondents in similar situations. Panchmahal contends that in other antidumping administrative reviews

of Indian companies, the cost reconciliation process occurred at verification with the Department working through it with the respondent. Panchmahal acknowledges that the Department's demands and expectations may be different between reviews. However, Panchmahal maintains that when the standard is raised, the Department cannot assume that a respondent's experience from a previous review makes it fully experienced to meet the demands of a new review.

Panchmahal argues that the Department's basis for using an adverse inference when applying facts available is not sufficient to determine that it did not act to the best of its ability in responding to the Department's requests for information. Panchmahal notes that one of the Department's reasons for applying adverse facts available, that the Department repeatedly requested the cost reconciliation and Panchmahal was unable to provide it, does not show that the respondent did not act to the best of its ability. Panchmahal claims that repeated problems in timeliness and completeness of submissions, even after many opportunities to respond, does not show that the respondent has failed to act to the best of its ability, but may simply show that the respondent does not understand how to respond. See Steel Authority of India v. United States, 149 F. Supp. 2d 921, 929-932 (CIT 2001) ("Steel Authority of India"); American Silicon Technologies v. United States, 110 F. Supp. 2d 992, 1003 (CIT 2000) ("American Silicon Technologies"); Viraj Impoexpo Ltd. v. United States, 2002 CIT LEXIS 76; Slip Op. 2002-77 at 115-16 (July 20, 2002) ("Viraj Impoexpo").

Panchmahal further argues that its experience in a prior administrative review (see Stainless Steel Bar From India: Preliminary Results of Antidumping Duty Administrative Review and Partial Recision of Administrative Review, 66 FR 8939, (February 5, 2001) ("Steel Bar")) cannot be used by the Department to assert that Panchmahal should and did understand the requirements of the Department in this review. See Rubberflex v. United States, 1999 CIT, Slip Op. 99-68 (July 23, 1999) ("Rubberflex"). In fact, Panchmahal asserts, the experience from the previous review showed that it did not understand how to complete a cost reconciliation. Regardless, Panchmahal argues that the experience of a respondent in prior proceedings offers little, if any, insight into its actions during a particular proceeding. See Nippon Steel Corp. v. United States, 146 F. Supp. 2d 835, 837-843 (2001) ("Nippon Steel"); Carpenter Technology Corp. v. United States, 2002 CIT, Slip Op. 02-77 (July 30, 2002) ("Carpenter Technology Corporation"); Viraj Impoexpo, Slip Op. 2002-77 at 13. Panchmahal contends that the requirements, and rigor thereof, of an administrative review can vary from review to review.

Furthermore, Panchmahal asserts that the Department should not rely on the dumping margin alleged in the original petition because petition allegations are unreliable and unverified. See World Finer Foods, Inc. et. al. v. United States, 2000 CIT, Slip Op. 2000-72 at 19029 (June 26, 2000) ("World Finer Foods"). Additionally, respondents claim that the dumping margin imposed in the preliminary results is not permissible because before using the dumping margin alleged in the petition as adverse facts available, the Department is required by Congress to corroborate the dumping margin used to ensure that it is accurate and has some basis in reality. Id. (citing section 776(c) of the Act; F. lii De Cecco di Filippo Fara S. Martino S.p.A. v. United States, 216 F.3d 1027, 1032 (Fed. Cir. 2000) ("F. lii De Cecco di Filippo Fara S. Martino S.p.A.")). Panchmahal argues that the Department made no attempt to corroborate the 48.80 percent dumping margin imposed in the preliminary results.

Finally, Panchmahal states that the Department cannot apply the dumping margin calculated for

Mukand to Panchmahal as facts available because the dumping margin for another respondent in the same review cannot be applied as an adverse inference when the margin for the other respondent is based on that company's uncharacteristic business expense. See Fresh Cut Flowers from Mexico: Final Results of Antidumping Administrative Review, 61 FR 6812, 6814 (February 22, 1996) ("Fresh Cut Flowers from Mexico"); Preliminary Results. Panchmahal asserts that Mukand's dumping margin is driven entirely by a highly abnormal interest cost adjustment, and thus, precludes the Department from applying it to Panchmahal.

Petitioner argues that the Department should affirm the 48.80 percent "all others" dumping margin that it applied to Panchmahal in the preliminary results. Petitioner argues that the Department should not consider the comments submitted by Panchmahal because Panchmahal failed to identify with any specificity which of its two submissions in January 2003, it deemed to be its case brief. Given that the respondent did not specifically identify which submission was its case brief, the petitioner urges the Department to find that the respondent did not file a case brief.

Petitioner notes that the statutory scheme that applies when the Department is faced with making a determination on the basis of facts otherwise available is two-tiered: first, the Department decides whether the use of facts available is appropriate under section 776(a)(2) of the Act; and, second, then decides whether to apply adverse inferences under section 776(b) of the Act. See, e.g., Kompass Food Trading Int'l v. United States, CIT 2000, Slip Op. 00-90 at 7 (July 31, 2000) ("Kompass Food Trading International"). Petitioner asserts that the Department has satisfied both parts of the statutory analysis, supporting each finding with substantial record evidence.

Petitioner contends that the record contains abundant evidence showing Panchmahal's failure to provide information requested by the Department. Petitioner points to the Department's own description of events to explain that the Department provided extra assistance and repeatedly requested information, but Panchmahal still failed to provide its cost reconciliation. See Preliminary Results. Petitioner notes that the original questionnaire issued to Panchmahal requested a cost reconciliation, and five of the six supplemental questionnaires asked Panchmahal to reconcile its costs reported to the Department to its own financial statements. Petitioner notes from the Preliminary Results that Panchmahal failed to explain why it could not provide the cost reconciliation. Petitioner argues that Panchmahal knew the requirements for submitting a cost reconciliation based on its previous experience and simply declined to comply with the Department's requests. Thus, petitioner contends that Panchmahal failed to comply to the best of its ability. Petitioner further notes that the inadequacy and untimeliness of the response by Panchmahal prevented the Department from conducting a verification of Panchmahal.

Petitioner also cites correspondence between Panchmahal and its counsel that shows respondent's own counsel agrees that the Department has given Panchmahal more assistance than is typical and shows that Panchmahal has not submitted the requested information, nor explained why it is unable to do so. See letter of November 12, 2002 from Panchmahal's counsel ("November 12, 2002 letter") to the Department containing correspondence between counsel and Panchmahal.

Petitioner contends that the record contains abundant evidence showing that Panchmahal failed to cooperate by not acting to the best of its ability. Petitioner cites the Preliminary Results in which the Department describes specific phone conversations and electronic-mails between Panchmahal and the

Department where the Department explained precisely what information it needed from the respondents. Despite these explicit explanations and five questionnaires requesting the cost reconciliation, petitioner contends, Panchmahal refused to submit a cost reconciliation, and thus, it did not act to the best of its ability.

Petitioner states that Steel Authority of India and American Silicon Technologies, cases cited by respondents supporting its claim that untimeliness and incompleteness of response do not amount to a failure to respond to the best of one's ability, only stand for the proposition that the Department must give a sufficient explanation when determining that a respondent has not acted to the best of its ability. In this case, petitioner contends, the Department has articulated a complete explanation based on the facts of record. Petitioner argues that the record shows that the Department provided more than normal assistance to Panchmahal. Petitioner maintains that the company should have been able to comply with the Department's request for a cost reconciliation, but it simply did not do so. Thus, petitioner contends, the Department satisfied the standard for applying facts available. See Nippon Steel Corp. v. United States, 118 F. Supp. 2d 1366, 1378-79 (2000) ("Nippon Steel II"); Steel Authority of India, 149 F. Supp. 2d 921, at 929-930. Further, petitioner states that respondent's reliance on Carpenter Technology Corporation is not correct because in that case the Department's instructions were less than clear and the respondent could have been confused. However, petitioner asserts that, in this case, the record shows that the Department's instructions to Panchmahal were very clear, that requests for cost reconciliations are standard requests, and that other respondents had no difficulty in responding.

Petitioner contends that when a respondent is asked by the Department to provide information that does exist, and the respondent fails to provide that information without an adequate demonstration of its inability to respond, the Department is entitled to use facts available to make an adverse inference. See Chrome-Plated Lug Nuts from Taiwan: Final Results of Antidumping Duty Administrative Review, 64 FR 17314, 17315-216 (April 9, 1999), affirmed by, Gourmet Equipment Corp. v. United States, CIT, Slip Op. 00-78 at 14-15 (July 6, 2000) ("Chrome-Plated Lug Nuts"). Petitioner asserts that Panchmahal failed to explain why it could not respond to the Department's requests except for a generalized claim of its inability to provide a cost reconciliation, and later did demonstrate its ability to prepare one. Additionally, petitioner argues that the Department is not required to find evidence of intent or willfulness before applying adverse facts available. See section 776(b) of the Act; Fujian Mach. & Equip. Imp. & Exp. Corp. v. United States, 178 F. Supp. 2d 1305, 1334 (CIT 2001). Petitioner asserts that the courts have repeatedly upheld the Department's determination of lack of cooperation to the best of a party's ability absent any finding of willfulness. See, e.g., Mannesmannrohren-Werke AG v. United States, 120 F. Supp. 2d 1075, 1085 (CIT 2000).

Petitioner asserts that Panchmahal's participation in prior reviews, particularly reviews in which it was asked to provide a cost reconciliation, are relevant to its experience and to whether it acted to the best of its ability with respect to preparing a cost reconciliation in this review. Petitioner states that Panchmahal cannot rely on the authorities it cited to support its claim that prior review experience is irrelevant to the determination of what respondents can be expected to understand. Petitioner contends that the court in Carpenter Technology Corporation held that the "generic" experience of a respondent in one proceeding offers little insight into the actions of the respondent in a subsequent proceeding.

Also, petitioner contends that Rubberflex has no bearing on this case because it only held that the Department cannot assume that a respondent will be aware of whether a document would be the same from one review to another. See Rubberflex at 23. Given that Panchmahal had been assigned a total adverse facts available dumping margin in the antidumping administrative review of stainless steel bar from India, petitioner argues that Panchmahal had actual, specific experience that made it aware of what it needed to do to respond adequately to the Department's requests. See Stainless Steel Bar from India: Final Results of Antidumping Administrative Review 66 FR 112, 31208 (June 11, 2001) ("Steel Bar II"); Panchmahal Steel Limited Verification Report, period of review 2/1/1999 - 1/31/2000, at 14 (January 4, 2001). Petitioner maintains that Panchmahal's simple claim of lack of understanding, with no explanation, does not excuse it in this review since this is not the first time that it has undergone a review in which the company was required to provide a cost reconciliation or face adverse consequences.

Petitioner contends that Panchmahal should continue to be assigned the 48.80 percent "all others" dumping margin as adverse facts available, and refute respondent's contention that the 48.80 percent margin is impermissible because it relies on the original petition, and further that it is not corroborated. Petitioner asserts that the Statement of Administrative Action does not require the Department to prove that "the facts available are the best alternative information." See Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103-316(I)(1994) at 669 ("SAA"). Petitioner asserts that the SAA allows the Department to employ adverse inferences about missing information to ensure that the respondent does not obtain a more favorable result by failing to cooperate than if it had cooperated fully. *Id.* at 870. The SAA, petitioner explains, specifically identifies the petition as a source from which the Department may make an adverse inference.

Petitioner contends that corroboration is necessary only to satisfy the agency that the secondary information has probative value. Petitioner asserts that the courts permit the Department to rely on the common sense inference that the highest margins are the most probative because the respondent did not present information to rebut this inference. See Kompass Food Trading International at 13. Petitioner argues that where, as here, the dumping margin alleged in the petition has never been shown to be lacking in probative value, there is no reason why Commerce cannot continue to rely on a petition-based rate as adverse facts available. Further, petitioner contends that Panchmahal, despite numerous opportunities to do so, failed to submit information to rebut this presumption. Thus, petitioner argues that the margin alleged in the petition is justified.

Finally, petitioner rebuts Panchmahal's claim that the dumping margin calculated for Mukand should not be applied to Panchmahal. Petitioner maintains that there has been no showing on the record, nor any determination by the Department that Mukand's dumping margin is driven entirely by a highly abnormal interest cost adjustment. Petitioner asserts that the highest rate available should be used as an adverse inference for Panchmahal whether it is from the calculation for Mukand or from the petition-based "all others" rate.

Kurt Orban's Case Brief

Kurt Orban argues that they are concerned about Panchmahal's preliminary margin given the

dramatic impact of the Department's decision in the Preliminary Results. Kurt Orban notes that careful attention should be paid to avoiding the use of a punitive duty irrespective of reality. Kurt Orban maintains that upon learning of Panchmahal's difficulties supplying usable data to the Department, it assisted Panchmahal in providing the Department with the requested cost reconciliation. Kurt Orban notes that it regrets the Department did not accept the data submitted on December 30 and 31, 2002. Kurt Orban requests that the Department reconsider the cost reconciliation submitted on December 30 and 31, 2002. Lastly, Kurt Orban also requests that the Department verify Panchmahal and assures the Department that experts will be on site at Panchmahal to assist.

Department's Position: We disagree with respondent. Our determination to rely on adverse facts available is supported by the evidence on this record and is consistent with section 776(b) of the Act.

In its case briefs, Panchmahal argues that it is a small company that lacked the resources to comply with the Department's request and thus must obtain on-site, face-to-face, personal assistance that was provided by U.S. importers¹ (i.e., Kurt Orban). While the Department notes that some respondents may have limited resources at their disposal with which to respond to Department questionnaires, the Department is available to assist a respondent but cannot provide on-site assistance. See the Department's original questionnaire ("Original Questionnaire") dated January 29, 2002, at page A-3. Also, the Department does everything possible to provide respondents with adequate time and assistance (e.g., through supplemental questionnaires, telephone conversations, emails, letters, etc.) to allow them to respond to Departmental questionnaires. See section 782(c) and (d) of the Act.

In the current review, the Department offered Panchmahal the opportunity to supplement its questionnaire responses pursuant to section 782(d) of the Act to address the deficiencies and omissions of data which rendered its previous responses inadequate for use in the preliminary results and granted multiple extension of time requests for Panchmahal to submit requested questionnaire responses. In particular, the Department issued six supplemental questionnaires for section D (i.e., August 27, 2002; September 12, 2002; October 1, 2002; October 23, 2002; October 28, 2002; and November 7, 2002). Five of these supplemental questionnaires requested Panchmahal to reconcile its reported POR per-unit costs to its financial statements. In the supplemental questionnaires, the Department also requested that Panchmahal calculate its cost of production figures based on actual costs incurred by Panchmahal during the POR. Moreover, in accordance with section 782(c) of the Act the Department also considered Panchmahal's difficulties in submitting the requested information and provided additional telephone and electronic-mail clarifications. See below for a complete discussion of these clarifications.

In response to the Department's second offer to Panchmahal for telephone assistance in providing the required cost reconciliation, Mr. Pratik, a Panchmahal official, contacted the Department by phone on November 1, 2002. During the phone conversation with Mr. Pratik on November 1, 2002, Mr. Robert Bolling and Mr. Brandon Farlander explained to Panchmahal how to reconcile its

¹The Department considers Kurt Orban an interest party pursuant to section 771(9)(A) of the Act because they are a U.S. importer of subject merchandise.

POR per-unit costs to its financial statements. Additionally, on November 1, 2002, Brandon Farlander sent e-mail instructions to Panchmahal explaining how to reconcile its cost system to its POR per-unit costs. See Memorandum to the File dated November 1, 2002. Although Panchmahal provided what it alleged were its reported cost data on a POR basis in the fifth supplemental questionnaire response, Panchmahal still failed to explain the methodology it used to derive its POR per-unit costs from its cost accounting system. See fifth Supplemental Questionnaire Response, received November 5, 2002. Upon examination of this response, the Department determined that Panchmahal still did not reconcile its costs to its financial statements. The Department issued another supplemental questionnaire requesting Panchmahal to reconcile its costs. See the Department's November 7, 2002 sixth supplemental questionnaire. Indeed, Panchmahal's own counsel noted the Department's effort in assisting Panchmahal with the required cost reconciliation when he wrote in an e-mail correspondence to his client. See November 12, 2002 letter.

Despite the Department's assistance, Panchmahal continuously failed to provide the required cost reconciliation necessary for the Department to conduct a verification. The Department provided Panchmahal numerous opportunities and supplemental questionnaires to fully respond to the Department's request for a cost reconciliation and to correct response deficiencies, in accordance with section 782(d) of the Act. See Cancellation of Verification Memorandum to the File from Stephen Bailey to Ed Yang, dated November 18, 2002 ("Cancellation Memorandum"). That Panchmahal failed to provide the required cost reconciliation was not due to a lack of cooperation or assistance from the Department.

Additionally, the Department disagrees with Panchmahal's argument that failing to provide the required cost reconciliation does not demonstrate a failure to act to the best of its ability. If Panchmahal was able to provide its per-unit POR costs, then based on general accounting principles Panchmahal should have been able to provide a cost reconciliation. Nonetheless, respondent's November 12, 2002 letter makes perfectly clear that it did not provide the Department with a cost reconciliation, as demonstrated by counsel's comments to Panchmahal which read in part, "No, you did not reconcile the cost figures reported to DOC to your financial statements. . . . No where do you tie financial statement figures to the figures reported to DOC." See November 12, 2002 letter at page 4. As explained in the Department's letter dated November 14, 2002 canceling verification, without the requested cost reconciliation information, the Department is unable to verify the information Panchmahal submitted. Also, the Department has cancelled verification in several other cases because of incomplete questionnaire responses, and specifically because the respondents failed to provide requested reconciliations. See, e.g., Gourmet Equipment Corp. v. United States, Slip Op. 2000-78 (CIT July 6, 2000) (citing Chrome-Plated Lug Nuts (the Department refused to conduct verification because the respondent's submissions were not reconcilable to its financial statements, meaning the information submitted was unverifiable; as a result, the Department applied facts otherwise available.)); Certain Hot-rolled Carbon Steel Flat Products from Taiwan: Final Determination of Antidumping Duty Order, 66 Fed. Reg. 49618, 49620-21 (Sept. 28, 2001) (the Department cancelled both sales and cost verification because respondents failed to provide an explanation and documentation for all its expenses and sales, and provided incomplete, deficient, and inconsistent affiliated-party sales information); Certain Cut-to-Length Carbon-Quality Steel Plate Products from Indonesia, 64 Fed. Reg. 73164 &

73165-65 (Dec. 29, 1999) (the Department cancelled verification and applied adverse facts available because the respondent did not adequately address the sales-related and cost-related questions).

As explained in the Preliminary Results, Panchmahal's failure to reconcile its financial statements to its POR per-unit costs as requested by the Department in its original and six supplemental questionnaires constitutes a failure to cooperate to the best of its ability because Panchmahal did not provide the required information, without explanation, and because Panchmahal also withheld the information it knew the Department required for a cost verification based on its own previous experience in antidumping duty review proceedings. See Cancellation Memorandum; Steel Bar. Moreover, in its responses, Panchmahal did not provide the Department with any specific explanation or reason why it could not comply with Department requests for a cost reconciliation and therefore did not adequately demonstrate its inability to respond. Thus, for these reasons, Panchmahal declined to comply to the best of its ability under sections 776(a)(2)(A) and (B). Most importantly, Panchmahal failed to provide the requested information which resulted in an inadequate response that prevented the Department from conducting verification and using Panchmahal's data in the preliminary results. See Cancellation Memorandum. Thus, pursuant to sections 776(a)(2)(A) and (B) of the Act, and as explained in the Preliminary Results, the Department has satisfied sections 782(c)(2), (d), and (e) of the Act, and applied facts otherwise available in this proceeding.

Further, the Department disagrees with Panchmahal's argument that the Department will conduct verification without a reconciliation and should have done so in this case. Providing a complete reconciliation prior to verification is essential for the Department to understanding the methodology employed to extract relevant sales and cost data from company records. See Cancellation Memorandum. The reconciliation is required of respondents to determine if all appropriate costs for the subject merchandise have been reported. The cost reconciliation also serves as a "starting point" for the Department at verification. See Certain Cut-to-Length Carbon Steel Plate from Mexico: Final Results of Antidumping Duty Administrative Review, 64 Fed. Reg. 77-78 (January 4, 1999). Without a reconciliation of POR costs to the financial statements, the Department cannot determine if the appropriate cost data have been reported. Using this guideline, Panchmahal's unreconciled cost data is viewed by the Department as unreliable. Panchmahal's counsel says as much in the November 12, 2002 letter when he states, "At this point, it is not even clear that you have used in your reported costs to DOC the figures in your financial records that lead to your financial statement." Among other things, the goal of verification is to confirm the accuracy and completeness of the data provided in a company's questionnaire responses. In addition to the numerous requests for this reconciliation, Panchmahal was made aware that verification would not occur unless the reconciliation was provided. See e.g., Department's third supplemental questionnaire dated October 1, 2002. Regardless of the conduct of the Department in other administrative reviews, Panchmahal was made aware in the current review that an adequate reconciliation was required prior to verification, and that without it verification would not take place. See the Department's fifth supplemental questionnaire dated October 28, 2002.

The Department disagrees with Panchmahal's argument concerning its participation in prior reviews. The Department did not argue in the Preliminary Results that Panchmahal's participation in the stainless steel bar case provided absolute knowledge of how to submit a cost reconciliation in the current proceeding. The Department only stated that prior knowledge and participation in a review

proceeding creates an awareness of the Department's requirements for submitting an adequate cost reconciliation. See Preliminary Results 68 FR at 1042-43. Panchmahal's awareness, coupled with the totality of the circumstances outlined above, highlights that Panchmahal knew a cost reconciliation would be required by the Department in the current review and Panchmahal had ample notice to prepare and provide the Department with an adequate cost reconciliation. Additionally, Panchmahal's admission in its case brief that prior case experience showed that it did not understand how to reconcile its costs demonstrates that Panchmahal, being aware it could not provide the Department with a required cost reconciliation, should have taken immediate steps to understand this very basic Department requirement and ascertain how to reconcile its costs. However, Panchmahal did not try to reconcile its costs until well after (*i.e.*, December 31, 2002, the signature date of the fully extended preliminary results, and approximately six weeks after the Department's last request) the Department requested it to submit its cost reconciliation. Accordingly, the Department rejected Panchmahal's cost reconciliation. See Letter to Panchmahal rejecting its apparent cost reconciliation dated January 16, 2003. The Department also notes that this submission was unsolicited and well after the due date for the submission of factual information which is 120 days after the start of the administrative review. See section 351.301(b)(2) of the Department's Regulations.

The Department agrees with petitioner's arguments regarding respondent's citation of Steel Authority of India, American Silicon Technologies, and Viraj Impoexpo. In particular, the Department notes that the Court upheld each of the Department's determinations to apply adverse facts available after providing sufficient explanation that the respondent failed to cooperate to the best of its ability. Steel Authority of India v. United States, 2001 CIT, Slip Op. 2001-149 (December 17, 2001); American Silicon Technologies v. United States, 240 F. Supp. 2d 1306 (CIT 2002); Viraj Impoexpo (in the Final Results of the review, the Department found that the respondent cooperated to the best of its ability, which was upheld in the litigation). The Department also agrees with petitioner's distinction between this case and the "generic" experience of the respondent in Carpenter Technology Corporation. In Carpenter Technology Corporation, the court ruled that the "generic" experience of a respondent in one proceeding offers little insight into the actions of the respondent in a subsequent proceeding. As petitioner argues, the court in Nippon Steel ruled that the "generic" experience as a respondent is far different from a situation in which, "the inadvertence claimed . . . also was an issue in this case." See Nippon Steel Slip Op. 01-52 at 8 (April 20, 2001). In addition, the Department notes that the Department's decision in stainless steel bar was based on Panchmahal providing the Department with a reconciliation which was discovered at verification to be incorrect. See Steel Bar. While the Steel Bar case did not involve the exact same issue in this proceeding, Panchmahal at least provided a reconciliation in Steel Bar that allowed the Department to conduct verification. However, in the current review Panchmahal did not even provide the reconciliation. Therefore, for the final results, the Department has continued to apply an adverse facts available rate to Panchmahal.

With regard to Panchmahal's argument that the Department is precluded from applying Mukand's dumping margin to Panchmahal due to an uncharacteristic business expense, the Department has not addressed this issue because we are using the "all others" rate from the investigation.

We agree with Panchmahal that the Department is required to corroborate, to the extent practicable, the secondary information used as facts available. Accordingly, the Department has

corroborated the “all others” rate. For a complete discussion of corroboration, see the Federal Register notice of the Final Results of Antidumping Duty Administrative Review in this proceeding.

We disagree with petitioner that Panchmahal’s letters to the Department of January 6 and 13, 2003, did not constitute its case brief. In its letter to the Department dated February 14, 2003, Panchmahal referenced letters it submitted in early January 2003 as its case brief. While Panchmahal failed to identify the exact date these letters were submitted, we consider Panchmahal’s reference to these documents adequate. Accordingly, the Department considers the letters of January 6 and 13, 2003 to constitute Panchmahal’s case brief.

With regard to Kurt Orban, as discussed above and in the Preliminary Results, Panchmahal: (1) failed to provide an adequate cost reconciliation after numerous supplemental questionnaires and telephonic and electronic-mail assistance; (2) provided the Department with no explanation or reason why it could not comply with Department requests for a cost reconciliation; (3) failed to provide or withheld the requested information which resulted in an inadequate response that prevented the Department from conducting verification and using Panchmahal’s data in the preliminary results; (4) received sufficient notice in the current review that an adequate reconciliation was required prior to verification, and that without it verification would not take place; and (5) learned or should have been aware, based on prior knowledge and participation in a review proceeding, of the Department’s requirements for submitting an adequate cost reconciliation before verification. Therefore, the Department disagrees with Kurt Orban.

B. Issues with Respect to Mukand

Comment 2: Consignment/Agency Sales

Mukand contends that Department and legal precedent demonstrate that a consignment agent relationship does not exist in this case and, therefore, the relevant sales for the Department’s final margin calculation are those sales made by Mukand to its unaffiliated U.S. customer.²

First, Mukand argues that section 772 of the Act and Department precedent establish that the first U.S. sale to an unaffiliated customer is the relevant sale for the purposes of calculating a dumping margin. See Certain Fresh Cut Flowers From Colombia; Final Results and Partial Rescission of Antidumping Duty Administrative Review, 62 FR 53287 (October 14, 1997), (“Fresh Cut Flowers from Columbia”) and accompanying Issues and Decision Memorandum at Comments 11 and 15. According to Mukand, its sale to its unaffiliated U.S. customer is the first U.S. sale to an unaffiliated customer and is therefore the relevant sale for consideration. Additionally, Mukand contends that section 772(f)(2)(B) of the Act requires the Department to exclude the “total U.S. expenses” incurred by Mukand from the U.S. price. Thus, Mukand argues that its unaffiliated U.S. customer’s prices and

² During the POR, Mukand sold subject merchandise to only one U.S. customer, the “unaffiliated U.S. customer.”

expenses are not relevant to the final margin calculation.

Second, Mukand argues that it is the Department's policy to disregard a "true" consignment transaction as a sale for the purposes of the antidumping statute, because the sale is actually made between the exporter and the downstream customer, with the consignment agent receiving only a commission for the sale. See Antidumping Manual at 9, Ch. 7 (http://ia.ita.doc.gov/admanual_Ch07.pdf) ("Antidumping Manual"); Fresh Cut Flowers from Columbia (Comments 11 and 15). According to Mukand, its unaffiliated U.S. customer buys from Mukand, resells the subject merchandise on its own account, is not Mukand's agent, and does not receive a commission from Mukand. Therefore, Mukand argues that there cannot be a consignment agent relationship between Mukand and its unaffiliated U.S. customer according to Department precedent.

Third, Mukand argues that according to applicable commercial law the Department is required to look at the reality of the transaction and give the term "sale" its ordinary meaning. See Monarch Luggage Co. v. United States, 715 F. Supp. 1115, 1117 (Ct. Int'l Trade 1989); Rosenthal-Netter, Inc. v. United States, 679 F. Supp. 21, 23 & 25 (Ct. Int'l Trade 1988), aff'd 861 F.2d 261 (Fed. Cir. 1988); Pier 1 Imports, Inc. v. United States, 708 F. Supp. 351, 354-57 (Ct. Int'l Trade 1989); Restatement (Second) of Agency (Section 14K). Mukand contends that commercial law sets out several criteria by which a sale is defined including title transfer between the parties, and payment by the buyer to the seller. In addition, Mukand argues that once a sale is completed the buyer may resell the product for its own account, or if it so chooses, the buyer may also inventory the seller's product for its own purposes without becoming the seller's agent, regardless of the titles used by the parties.

Based on these criteria, Mukand argues that its unaffiliated U.S. customer is not its agent. Further, Mukand asserts that it invoiced and transferred title to, while receiving payment from, its unaffiliated U.S. customer. Furthermore, Mukand contends that its unaffiliated U.S. customer resold the subject merchandise on its own account to its own unaffiliated U.S. customers, invoiced those customers, transferred title to those customers and received payment from those customers. According to Mukand, its unaffiliated U.S. customer assumed the risk of nonpayment by its own customers, despite being obligated to pay Mukand. Additionally, Mukand states that even the Department recognized that Mukand has no control over sales of its unaffiliated U.S. customer. See Consignment Sales Analysis for Mukand dated December 3, 2002 ("Consignment Sales Memorandum"). Therefore, Mukand argues that two separate sales occurred and that a consignment agent situation did not occur.

Finally, Mukand argues that the petitioner's and the Department's decision that Mukand's unaffiliated U.S. customer should report its resale data lacks a legal basis and fails to address the key legal issues and facts. According to Mukand, the terms "consignment" and "consignment agent" are being used without definition or application to the record evidence. Mukand argues that even though constructed export price ("CEP") sales exist, it does not follow that its unaffiliated U.S. customer should report its resale prices and expenses. Moreover, Mukand asserts that even if a consignment sale is involved, it does not mean a consignment agent is involved, it merely means that Mukand's products are being held in inventory at the customer's location until sold to the customer.

Regarding the use of the term "consignment" on some of the sales documents, Mukand argues that the Department and the courts stress that characterization by the parties is not dispositive but rather

how the transaction is structured is how the sale should be treated. See Hoogovens Staal v. United States, 138 F. Supp. 2d 1352; 2001 Ct. Intl. Trade LEXIS 54; Slip Op. 2001-42 (Ct. Int'l Trade 2001); Notice of Final Determination of Sales at Less Than Fair Value; Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Brazil, 64 FR 38756 (July 19, 1999) (“Hot-Rolled from Brazil I”); Certain Welded Stainless Steel Pipe From Taiwan; Final Results of Administrative Review, 62 FR 37543 (July 14, 1997) (“Ta Chen I”); Certain Welded Stainless Steel Pipe from Taiwan; Final Results of Administrative Review, 64 FR 33243, (June 22, 1999) (“Ta Chen II”); Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Low Enriched Uranium From France, 66 FR 36743 (July 13, 2001) (“Low Enriched Uranium From France”). In this case, Mukand notes, the term “consignment” solely means that Mukand continues to own the subject merchandise in the United States until purchased by the unaffiliated U.S. customer. According to Mukand, the fact that an exporter keeps the inventory at the customer’s location does not alter the fact that the sale between Mukand and its unaffiliated customer is the proper sale for purposes of calculating an antidumping margin, because the location of the subject merchandise prior to the sale is not determinative. See Ta Chen I; Ta Chen II.

Petitioner agrees with Mukand that section 772 of the Act seeks the first U.S. sale to an unaffiliated U.S. customer for purposes of the margin calculation. However, petitioner argues that the verified facts of the case demonstrate that consignment sales were made and thus the appropriate sales for consideration are the downstream sales by Mukand’s unaffiliated U.S. customer.

Petitioner states that the Department must determine whether a sale is a consignment sale, not based on the terms used by the parties, but by the facts presented. Also, petitioner contends that a consignment sale occurred, because the unaffiliated U.S. customer agreed to store the subject merchandise at its location prior to purchasing it and because Mukand’s unaffiliated U.S. customer sold the subject merchandise before purchasing it. Therefore, the relevant sales for consideration are the downstream sales, because the Department’s precedent requires it to disregard the consignment transaction. Further, petitioner argues that because the sales were made to an unaffiliated U.S. customer after they were imported and because those sales are consignment sales, the consignment transaction is disregarded, making the downstream sales the relevant sales on which to apply a CEP methodology.

Petitioner disputes Mukand’s argument that it is not affiliated with its unaffiliated U.S. customer, arguing that it does not matter whether or not the agent is unaffiliated with the producer/exporter in a consignment transaction, because the Department ignores a consignment sale between the exporter/producer and the unaffiliated consignment agent because the Department considers the agent to be affiliated with the producer/exporter. See Antidumping Manual. Petitioner states that Mukand negotiated with an unaffiliated U.S. agent to make consignment sales to unaffiliated U.S. customers. Therefore, petitioner argues that it is appropriate for the Department to request Mukand’s unaffiliated U.S. customer to report its resale prices and expenses, because the relevant sales for consideration are the downstream sales. See Notice of Preliminary Results of Antidumping Duty Administrative Review, Preliminary Determination to Revoke the Order in Part, and Partial Rescission of Antidumping Duty Administrative Review: Fresh Atlantic Salmon from Chile, 67 FR 51182, 51184 (August 7, 2002); Fresh Cut Flowers from Columbia.

Petitioner also asserts that Mukand “mischaracterizes” the Department’s decision in Fresh Cut Flowers from Columbia. Petitioner argues that the Department’s decision in Fresh Cut Flowers from Columbia concerns the issue of whether CEP profit should be deducted from the U.S. price in a consignment situation, which is unrelated to the issue of what constitutes the first unaffiliated price in a consignment sale, the issue in this review. Further, petitioner argues that Fresh Cut Flowers from Columbia determines that the proper sales for analysis in that review were the downstream sales, a point which Mukand failed to point out. Therefore, petitioner states there is no precedent to substantiate Mukand’s claim that the sale from Mukand to its unaffiliated U.S. customer is the proper sale for consideration.

Petitioner rebuts Mukand’s argument that a consignment sale can only occur where a commission is paid, stating that there is not precedent available upholding the necessity of a commission in a consignment sale. Petitioner states that how the sale was made is the relevant analysis and such analysis proves that Mukand’s unaffiliated U.S. customer sold the subject merchandise prior to purchasing it from Mukand. See Mukand’s August 23, 2002 Supplemental Response (“August 23rd response”) at Annexure 2. Therefore, petitioner argues that, despite the lack of a commission, consignment sales occurred; thus, the relevant sales for consideration are the downstream sales from Mukand’s unaffiliated U.S. customer.

Petitioner also agrees with Mukand that relevant commercial law requires the Department to look at the reality of a transaction. However, the petitioner disputes Mukand’s definition of the “reality” of the transactions at issue. Petitioner asserts that the record in this case supports its argument that the proper sales for consideration are those by Mukand’s unaffiliated U.S. customer to its own unaffiliated U.S. customers, not the sales between Mukand and its unaffiliated U.S. customer.

Petitioner also disputes Mukand’s claim that the Department’s and petitioner’s analysis on this issue is not based on existing law. Petitioner contends that the statute and Department precedent it uses to support its arguments remain unchallenged by Mukand and when weighed against the single case Mukand offers as support for its position demonstrates a lack of substance to Mukand’s argument.

Finally, petitioner states that Mukand appears to be admitting the existence of consignment sales, but because Mukand’s unaffiliated U.S. customer does not call itself a consignment agent, it should not be treated as one. Petitioner argues that the title used by the parties is irrelevant and that it is the Department’s responsibility to look to the nature of the transaction to determine whether it is actually a consignment sale. Petitioner states that the record evidence in this case shows that these transactions are consignment sales.

Department’s Position: We agree with both Mukand and petitioner in part. On December 3, 2002, the Department determined that certain sales made by Mukand’s international sales affiliate, Mukand International Limited (“MIL”) were consignment sales. See Consignment Sales Memorandum. For the preliminary results, the Department requested that Mukand’s unaffiliated U.S. customer report its downstream sales to the first unaffiliated U.S. customer. See Consignment Sales Memorandum. Upon further examination for the final results, the Department has reclassified the sales in question as sales made through an agent, but not consignment sales.

Section 771(33)(G) of the Act defines affiliated parties as any person who controls any other

person. The statute defines control of another person as being in a position, either legally or operationally, to exercise restraint or direction of the other person. The Department has interpreted this statute to include agents as affiliated parties, because a principal is in a position to exercise restraint or direction over its agent. See Notice of Final Determination of Sales at Less Than Fair Value: Engineered Process Gas Turbo-Compressor Systems, Whether Assembled or Unassembled, and Whether Complete or Incomplete from Japan (“Turbo-Compressors from Japan”), 62 FR 24394 (May 5, 1997). In defining what constitutes an agency relationship, the Department focuses on a range of criteria including: (1) the foreign producer’s role in negotiating price and other terms of sale; (2) the extent of the foreign producer’s interaction with the U.S. customer; (3) whether the agent/reseller maintains inventory; (4) whether the agent/reseller takes title to the merchandise and bears the risk of loss; and (5) whether the agent/reseller further processes or otherwise adds value to the merchandise. See Hot-Rolled from Brazil I (citing Final Determination of Sales at Less Than Fair Value: Furfuryl Alcohol from South Africa, 60 FR 22550 (May 8, 1995) (“Furfuryl Alcohol”)); Stainless Steel Wire Rod From the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review, 66 FR 51385 (October 9, 2001).

Additionally, the Department also examines factors such as whether the reseller can fix the price at which it sells without accounting to the manufacturer for the difference between that price and the price paid to the manufacturer; whether the reseller deals, or has the right to deal, in goods of other suppliers; and whether the reseller deals in its own name and does not disclose the supplier. See Certain Hot-Rolled Flat-Rolled Carbon Quality Steel Products from Brazil: Final Results of Antidumping Duty Administrative Review and Termination of the Suspension Agreement, 67 FR 6226 (February 11, 2002) (“Hot-Rolled from Brazil II”). However, in each case, the Department has decided that whether a relationship constitutes a principal-agent relationship is determined by the facts, on a case-specific basis. There is no bright line rule (e.g., although most agency relationships are established via written contract, the contract is not an essential for the relationship to exist). See Hot-Rolled From Brazil II. The focus of an agency analysis is whether it is agreed that the agent is to act for the benefit of the principal by inquiring as to the principal’s ability to control, rather than the actuality of control over specific decisions. See section 773(33)(G) of the Act; Hot-Rolled from Brazil II. The Department must examine the totality of the circumstances in order to analyze the principal-agent relationship to determine whether control exists. See Hot-Rolled from Brazil II. If the Department determines that there is an agency relationship in the United States, a CEP analysis applies in accordance with section 772(b) of the Act. See Turbo-Compressors from Japan.

As stated in the Consignment Sales Memorandum, and in the Agency Sales Analysis for Mukand dated May 8, 2003 (“Agency Sales Memorandum”), in the normal course of business, MIL makes direct sales to its unaffiliated U.S. customer. However, as the Department also noted in its Consignment Sales Memorandum, due to unique circumstances in this administrative review, a portion of Mukand’s sales to its unaffiliated U.S. customer required the Department to take a closer look at the transactions involved. As both Mukand and the petitioner mention, it is the Department’s duty to look beyond the titles and terms used by the parties to a sale, to the nature of the sales in question. See Mukand’s January 13, 2003 Case Brief (“Mukand Case Brief No.1”) at pages 5 and 6; Petitioner’s February 24, 2003 Rebuttal Case Brief (“Petitioner Rebuttal Brief”) at page 7.

In the Preliminary Results, the Department decided to treat certain MIL sales as consignment sales, because of the terms of an agreement (“the Agreement”) between MIL and its unaffiliated U.S. customer and because of the repeated use of the term “consignment” in Mukand’s responses and supporting documentation. See Consignment Sales Memorandum. After looking further at the nature of the sales in question and the Agreement, the Department has determined that there is no evidence indicating that a consignment commission was paid to the unaffiliated U.S. customer by MIL, nor is there any evidence indicating a prior history of a consignment relationship between the parties. Further, it does not appear that MIL entered into a consignment agreement with a known consignment agent, in which a specific consignment price between MIL and its unaffiliated U.S. customer was established. Thus, it appears that Mukand’s use of the term “consignment” was in reference to the action of keeping the material from the cancelled sales at the unaffiliated U.S. customer’s warehouse for future sale and to avoid the additional costs of returning the merchandise to India, pursuant to the Agreement. See Mukand’s supplemental response dated October 21, 2002 (“October 21st response”) at 1; Sales and Cost Verification of Mukand Limited in the Antidumping Administrative Review of Stainless Steel Wire Rods from India, dated December 10, 2002 (“Verification Report”) at 29. Based on these facts, the Department has determined not to classify the sales in question as consignment sales.

However, despite the decision to not classify these sales as consignment sales, the Department had to determine whether MIL’s actions regarding sales made after the signing of the Agreement constituted agency sales. On that point, the record evidence indicates that the sales in question of Mukand’s subject merchandise were made via an agency relationship with its unaffiliated U.S. customer because Mukand controlled the price and volume terms of the sale by its unaffiliated U.S. customer to the downstream U.S. customer. See Agency Sales Memorandum; August 23rd response at Annexure 2; October 21st response at Annexure 1. Therefore, the Department has reclassified these sales as agency sales.

Further because Mukand’s unaffiliated U.S. customer made agency sales, the Department has applied its CEP methodology. Thus, for the final results, the Department examined the first sale to an unaffiliated U.S. customer. Based on its consignment sales decision, the Department issued a questionnaire and two supplemental questionnaires, requesting Mukand to provide the sales and expense information for the downstream sales related to the consignment sales. On February 5, 2003, Mukand informed the Department that its unaffiliated U.S. customer had decided not to respond to the Department’s questionnaires. See Mukand’s February 5, 2003 letter to the Honorable Donald L. Evans (“February 5th letter”). Therefore, without the complete sales information from Mukand’s unaffiliated U.S. customer, the Department is unable to properly calculate a dumping margin which is inclusive of Mukand’s agent sales for the final results. See Department’s Position in Comment 3.

Comment 3: Use of Facts Available

Mukand contends that its U.S. customer is unaffiliated to Mukand. Thus, in order to comply with the Department’s request to have this unaffiliated U.S. customer report its resales, Mukand states that it had to go to great lengths to gain its customer’s cooperation in this matter, placing a major burden on its customer to provide a complete Section C response. Mukand further states that the

customer completed the request to the best of its ability. Therefore, Mukand argues because of its repeated perseverance to comply with the Department's request it should not be penalized for any failures on the part of the unaffiliated U.S. customer to provide a complete Section C response and the Department should not apply adverse facts available to these sales.

Petitioner argues that the Section C response provided by Mukand's unaffiliated U.S. customer was not complete as evidenced by the Department's issuance of a 19-page supplemental questionnaire, and by the fact that the Department could not use the information provided in Mukand's response (*i.e.*, January 2, 2003) in its preliminary results. Further, petitioner states that Mukand's argument that it should not be penalized for the failures of its unaffiliated U.S. customer's response, is irrelevant because the Department did not apply an adverse inference in its preliminary results, even though it had justification. According to the petitioners, the Department's decision to use neutral facts available in the preliminary results was in part due to the fact that the Department requested just prior to the preliminary results that Mukand report its unaffiliated customer's U.S. sales. However, petitioner contends, that due to the subsequent refusal of Mukand's unaffiliated U.S. customer to respond to the Department's supplemental questionnaire, the application of adverse facts available is justified and supported by precedence. Finally, petitioner also states that if the Department chooses to continue to apply its decision from the preliminary results, it is supported by substantial evidence on the record.

Department's Position: Sections 776(a)(1) and (2)(B) of the Act state that if necessary information is not available on the record, or if a party fails to provide such information in the form or manner requested by the Department, the Department shall apply facts otherwise available. Because Mukand did not provide all of the U.S. downstream sales data for its unaffiliated U.S. customer as required by the Department, we have determined that facts available are warranted, pursuant to section 776(a)(2)(B) of the Act.

This administrative review presents the Department with a unique set of facts which must be considered in their totality. Mukand is the producer in this review who sells to the United States through MIL, a wholly-owned subsidiary of Mukand and the importer of record in this review. MIL sells to one U.S. customer who is unaffiliated with Mukand and MIL. In the normal course of business, Mukand makes EP sales to its unaffiliated U.S. customer in the United States through MIL. See Verification Report at 29; Agency Sales Memorandum. However, due to unusual circumstances, the unaffiliated U.S. customer refused to accept delivery of a large quantity of subject merchandise sold by Mukand during the POR. See Verification Report at 29; Agency Sales Memorandum. In order to avoid further loss on these sales (*i.e.*, cancelled sales), MIL and the unaffiliated U.S. customer signed an agreement ("the Agreement") to store these cancelled sales at the U.S. warehouse of the unaffiliated U.S. customer. See Verification Report at 30; Agency Sales Memorandum. During the POR, MIL invoiced the unaffiliated U.S. customer for a portion of these cancelled sales stored at the unaffiliated U.S. customer's U.S. warehouse. See Verification Report at 30; Agency Sales Memorandum.

On December 3, 2002, less than a month before the Preliminary Results was to be signed (*i.e.*, December 31, 2002), the Department determined that resales of the subject merchandise from the cancelled sales, made during the POR from the unaffiliated U.S. customer's U.S. warehouse, were consignment sales. See Consignment Sales Memorandum. This decision was based on the terms of

the Agreement, which in the Department's opinion, changed the relationship between MIL and the unaffiliated U.S. customer from one of a seller and buyer relationship to a consignment relationship. Id. This decision effectively required Mukand to report the sales from its unaffiliated U.S. customer to the unaffiliated U.S. customer's downstream customers ("the downstream customers"), because the transaction between a consignment agent and the producer is disregarded for purposes of calculating a dumping margin. Although for the purposes of these final results the Department is reclassifying the consignment sales as sales made through an agent, the sales from Mukand's U.S. customer to the U.S. customer's downstream customers would still be needed by the Department for its dumping analysis. See Comment 2 above; Agency Sales Memorandum.

On December 5, 2002, the Department formally informed Mukand of its decision to treat the CEP sales as consignment sales and requested Mukand to respond to the Department's November 26, 2002 supplemental questionnaire. See Department's Letter of December 5, 2002. On December 9, 2002, Mukand requested an extension of time to respond to the Department's request for the downstream customers' information. See Letter to the Honorable Donald L. Evans dated December 9, 2002. On December 13, 2002, Mukand provided the Department with its supplemental response, which included a set of sales invoices and other sales documents. See Mukand's Supplemental Response dated December 13, 2002 ("December 13th response"). However, on December 17, 2002, after reviewing the supplemental response, the Department determined that the information provided by Mukand was not sufficient and issued a second supplemental questionnaire concerning the U.S. downstream customers' information. On December 30, 2002, Mukand requested an extension of time to respond to the Department's second supplemental questionnaire. See Mukand's Letter to the Honorable Donald L. Evans dated December 30, 2002. On December 30, 2002, the Department granted Mukand's request for submitting the data until January 2, 2003. See Memorandum to the File dated December 30, 2002. On December 31, 2002, the Preliminary Results for this review were signed.

On January 2, 2003, Mukand provided the Department with its second supplemental questionnaire response on the U.S. downstream customer's sales. See Mukand's January 2, 2003 supplemental response ("January 2nd response"). Additionally, on January 13, 2003, Mukand provided a copy of a letter dated December 9, 2002, which it sent to its U.S. customer requesting that the U.S. customer to provide its downstream sales information. See Mukand's Case Brief dated January 13, 2003. Upon review of the January 2nd response, the Department issued a third supplemental questionnaire concerning the U.S. downstream customers' information. See the Department's Supplemental Questionnaire dated January 22, 2003. Finally, on February 5, 2003, Mukand informed the Department that the U.S. customer had decided not to respond to the Department's January 22, 2003 supplemental questionnaire despite Mukand's warning of the consequences of their failure to respond, and despite Mukand's offer of assistance to prepare the response. See February 5th Letter.

Based on these unique circumstances in this administrative review, the Department finds that the use of adverse facts available for this small quantity of unusual sales is not warranted. In order to apply an adverse inference in the selection of facts available, section 776(b) of the Act requires the Department to find that a party failed to cooperate by not acting to the best of its ability to comply with a request for information. Upon further review of the record evidence, as discussed above, the

Department has determined that Mukand has, to the best of its ability, provided what downstream data it could for the sales in question, as we required. Specifically, the Department determines that Mukand acted to the best of its ability to provide the Department with certain requested supplemental questionnaire responses regarding the U.S. downstream sales data. See December 13th response and January 2nd response. The evidence further suggests that the requested U.S. downstream sales data was not provided to the Department because of the U.S. customer's failure and refusal to comply with the Department's January 22nd supplemental response. See February 5th letter. Furthermore, Mukand submitted copies of its letters to the U.S. sales agent/customer requesting it to provide the information and offering to help. All information required was not provided with respect to agency sales, because Mukand's agent/customer did not participate. In this instance, the unaffiliated customer for the vast majority of Mukand's sales became the agent for only a few small sales due to unusual circumstances. Thus, we find that, given this unique set of circumstances, an adverse inference is not warranted. However, the Department notes that in this POR, only a small amount of the subject merchandise stored at the U.S. warehouse of Mukand's unaffiliated U.S. customer was sold. The Department, therefore, intends to further examine this issue of agency sales in subsequent reviews. In this review, as fact otherwise available, we have applied the weight-averaged margin of the reported export price sales to those sales determined to be agency sales.

Comment 4: Interest Expense

Mukand states that in the Preliminary Results, the Department calculated its interest expense ratio by dividing the total interest costs incurred by its total company-wide cost of goods sold ("COGS"). However, Mukand argues that a portion of the interest costs associated with building a plant that was not operational during the POR and that produces non-subject merchandise was correctly capitalized ("the capitalized amount") in its audited financial statement. See August 23rd response at Annexure 5, Note 19(a), page 67. Mukand argues that it is an established accounting practice to capitalize such costs to ensure that the costs are allocated to the products to which they apply. Mukand contends that it is the Department's practice to accept a company's financial statements if they accurately reflect the costs of the products produced. Therefore, Mukand argues that the Department should recognize that it properly capitalized these interest expenses, and deduct the capitalized amount from the numerator (i.e., Finance Charges and Exchange Variation), and should also deduct the capitalized amount from the category "expenses transferred to the capital account/capital WIP" from the denominator (i.e., COGS). Finally, Mukand states that the Department should use the alternative interest expense ratio calculation it submitted excluding the interest costs incurred solely by the Hospet plant, because the Hospet plant was built to produce non-subject merchandise.

Petitioner states that in its Preliminary Results, the Department correctly noted that Mukand overstated the amount of capitalized interest expense attributed to the Hospet plant thus, understating its interest expense numerator, and inflated Mukand's COGS by including selling, general, and administrative ("SG&A") expenses in its interest expenses. Petitioner argues that Mukand's profit and loss statement has separate line items for "Finance charges and exchange variation" and for "Expenditures transferred to Capital accounts/Capital WIP," but that the capitalized amount is only included in the category "Expenditures transferred to Capital Accounts/Capital WIP." See August 23rd response, Annexure 5 at page 62. Thus, petitioner contends that the capitalized amount is included in the expenditures transferred to capital accounts/capital WIP, and it cannot be in the finance charges category because it would result in double-counting. Therefore, petitioner argues the Department should not remove the finance charges because it would be understating the interest expense.

Further, petitioner argues that Mukand overstates the capitalized amount by a factor of three. See August 23rd response, Annexure 5 page 67. Petitioner states that Mukand lists nine cost categories but then backs out several categories. Petitioner asserts that it is proper to assume that all costs were incurred evenly in producing the revenues because there is no way to assign costs to revenues. Thus, petitioner contends that it is rational to reduce the capitalized amount by approximately one third (the balance amount capitalized divided by the total costs for the trial run of the new production facility). See August 23rd response, Annexure 5, page 67 Note 19(a). Accordingly, petitioner argues that if the Department decides to offset Mukand's interest expense it should utilize only one third of Mukand's total capitalized amount.

Furthermore, petitioner states that the Department correctly calculated its preliminary interest expense ratio, by basing its calculation on the consolidated financial statements, and the Department should not reduce Mukand's interest expense by the capitalized amount in the denominator (i.e.,

COGS).

Moreover, petitioner argues that the Department should reject Mukand's alternative calculation because it would contradict the Department's policy that money is fungible and, therefore, the interest expense cannot be allocated based on the final products. See Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Flat-Rolled Carbon-Quality Steel Products from Brazil, 65 FR 5554, 5581 (February 4, 2000). Finally, petitioner argues that this alternative calculation contradicts the Department's policy of calculating interest expense ratios from the consolidated financial statements.

Department's Position: We agree with both Mukand and petitioner in part. In the preliminary results, consistent with the Department's past practice, we recalculated Mukand's interest expense ratio using its fiscal year ("FY") 2002 consolidated financial statements. Specifically, we calculated the ratio by including the total "Finance Charges and Exchange Variation" line item from the profit and loss statement ("P&L") as the numerator. For the COGS denominator, we reviewed each detailed line item of the P&L and the notes to the financial statements to determine the appropriate amounts that should be included. We note that in the COGS denominator we included, as an offset, the total amount reported in the line item "expenditures transferred to capital account/capital WIP" ("capitalized costs") from the financial statements. We note that the expenditures transferred to the capital account related to the construction of Mukand's new plant. This new facility does not produce the merchandise under review. See Mukand's Preliminary Analysis Memorandum dated December 31, 2002 ("Mukand Preliminary Analysis Memorandum") at 4.

However, upon further examination, the Department agrees with Mukand that a portion of the total "finance charges and exchange variation" amount was related to capitalized interest and should not be included in the interest expense calculation. We made this determination by further reviewing the consolidated financial statements and detailed notes to the financial statements. Specifically, note 19(a) of the notes to the financial statements states that a portion of the costs incurred related to Mukand's new facility were capitalized. Note 19(a) also provided a calculation of the amount capitalized by showing a detailed breakdown of the total cost incurred on the new facility and the portion that was capitalized during the FY. We note that the portion that was capitalized was recorded as a separate line item, "expenditures transferred to capital account/capital WIP," on the P&L after total expenditures. Therefore, the capitalized amount was used as an offset to Mukand's total expenditures and recorded as an asset on the balance sheet in its normal books and records in accordance with Indian GAAP. Since the cost was recorded as a separate line item on the P&L after total expenditures, it is reasonable to assume that each amount in the detailed breakdown of the total costs incurred on the new facility are included in the P&L in the line items that specifically relate to the nature of each transaction (*i.e.*, material, labor, interest, etc.). In other words, each amount was originally recorded and remains in the respective account based on the nature of the transaction and the capitalized cost line item on the P&L is an amount recorded to transfer a portion of those expenses to an asset account. Therefore, if we used the total "finance charges and exchange variation" amount from the P&L in the numerator of Mukand's financial expense ratio and did not allow an offset for the portion of capitalized interest included in the "expenditures transferred to capital account/capital WIP"

line, we would be overstating the interest expense.

To determine the portion of the capitalized cost that relates to interest expense, we referred to note 19(a) of Mukand's consolidated financial statements. As stated above, note 19(a) provided a detailed breakdown of the total cost incurred on the new facility. This breakdown showed that one third of the total cost incurred was related to interest expense. Therefore, it is reasonable to assume that one third of the capitalized costs is included the "finance charges and exchange variation" line item on the P&L. As such, in calculating Mukand's interest expense ratio we have excluded from the interest expenses one third of the capitalized cost. In addition, because the amount in question is related to interest expense, it should also not be included in the COGS denominator. Therefore, we have also reduced the capitalized cost amount, used as an offset to the COGS denominator, by the one third.

Therefore, for the final results, the Department has recalculated Mukand's interest expense ratio, by reducing the numerator ("Finance Charges and Exchange Variation") by one third of the reported capitalized amount, and increasing the denominator ("COGS") by one third of the capitalized cost amount. For further details, see Mukand's Final Analysis Memorandum dated May 8, 2003 ("Mukand Final Analysis Memorandum").

Comment 5: Sales Overhead Expenses

Mukand states that the Department reviewed and revised the general and administrative ("G&A") expense ratio at verification, but that in the Preliminary Results the Department calculated a higher, non-verified G&A ratio that included the sales overhead expense. Mukand argues that it reported the sales overhead expenses included in the preliminary G&A expense ratio as direct selling expenses. Therefore, Mukand argues that the Department should recalculate its G&A ratio by excluding the sales overhead expenses from the G&A numerator.

Petitioner argues that the Department should not recalculate Mukand's G&A ratio, because Mukand's statement that certain sales overhead expenses were reported in its direct selling expenses is contradicted by the evidence on the record. According to the petitioner, Mukand has not reported the disputed sales overheads as direct selling expenses. See Mukand's April 5, 2002 Section B and C response ("Sections B and C response") at 27 and 62. Further, petitioner contends that Mukand's calculated G&A ratio was higher than the one used by the Department in the Preliminary Results, although this calculation may be based on incomplete or incorrect data. See Verification Report exhibit 5 at page 10.01.

Department's Position: We agree with both Mukand and petitioner in part. At verification, the Department examined Mukand's expenses. See Verification Report at exhibit 5. Upon examining Mukand's reported G&A ratio, the Department determined that several categories of expense that should have been classified as sales overheads were included in Mukand's G&A expenses. See Verification Report exhibit 5 at page 10.02. At verification, the Department requested Mukand to deduct these expenses from its G&A ratio and to add them to its sales overheads, thus revising its G&A ratio. See Verification Report exhibit 19-D at pages 1 and 4. In the Preliminary Results, the

Department applied this ratio to Mukand's costs. See Mukand's margin program from the Preliminary Results.

The Department agrees with petitioner that Mukand did not report these sales overhead expenses in its response as direct selling expenses. See Sections B and C response at 28, 62, 63 and Annexure 5; Mukand's July 17, 2002 supplemental response at 6; August 23rd response at 10; Mukand's September 26, 2002 supplemental response at 8, 9, and Annexure 20; Mukand's October 11, 2002 supplemental response at 4, 6, 8 and Annexure 7. However, the Department agrees with Mukand that the revised and verified G&A ratio, which excludes the sales overheads, is the proper G&A ratio for purposes of calculating the antidumping margin in this case, because the revised ratio excludes the indirect selling expenses that were errantly reported in the G&A calculation. The sales overheads which Mukand was asked to revise should have been included in Mukand's response as indirect selling expenses, and not included in the G&A ratio used by the Department. See Verification Report at exhibit 19-D at 1. Therefore, for the final results, the Department has recalculated Mukand's indirect selling expenses to include these sales overhead expenses that were requested during verification. See Mukand Final Analysis Memorandum.

Comment 6: Unrefunded Taxes

Mukand states that in its reported calculation of direct material costs, it included all taxes for which it did not receive offsets. Mukand argues that in the Preliminary Results, the Department added to Mukand's costs the unrefunded taxes that it reported, thus double-counting the unrefunded taxes. Mukand states that for the final results, the Department should not add the amount of unrefunded taxes to its costs, in order to avoid double-counting.

Petitioner argues that in the Preliminary Results, the Department treated Mukand's unrefunded taxes as U.S. direct expenses and not as a cost. Therefore, petitioner asserts that because the Department treated the unrefunded taxes as a U.S. direct expense, there is no double-counting.

Department's Position: We agree with Mukand. Mukand reported its unrefunded taxes in its Section D response as a part of its direct material costs. See Mukand's June 27, 2002 Section D response at D-20. In the margin calculation program, the Department double-counted the unrefunded taxes by including the variable unrefunded taxes ("UNRTAX") in its calculation of U.S. direct expenses and in Mukand's direct material costs. See Mukand's margin program from the Preliminary Results. Consequently, for the final results, the Department has removed the variable UNRTAX from the calculation of U.S. direct expenses so as to eliminate the double-counting that occurred in the Preliminary Results. See Mukand Final Analysis Memorandum.

Comment 7: Import Duties

Mukand states that at verification, the Department stated that although Mukand's request for duty drawback would likely be denied, Mukand may be able to reduce its cost of production ("COP") by the amount of import duty paid with its Indian government Duty Entitlement Passbook scheme

credits, thus reflecting that the duty was not paid. Mukand states that such a reduction would apply to both domestic and export goods. See Verification Report at exhibit 24-A. Mukand argues that by granting this adjustment its cost of production would be reduced, thus reflecting its actual cost of production.

Petitioner refutes Mukand's argument by first stating that Mukand failed to demonstrate the necessary link between the duties it paid on the inputs and the amount of duty rebated by the Indian government, thus failing to justify its claim for duty drawback. Second, petitioner argues that the import duties which Mukand wants to use to reduce its direct material costs are not included in Mukand's production costs and therefore cannot be backed out of its production costs. See Verification Report at exhibit 24-A.

Department's Position: We disagree with Mukand. At verification, the Department verifiers stated that a reduction to its costs of production may be possible, but also informed Mukand officials that they had to consult with Department officials regarding such a decision. In the Preliminary Results, the Department decided that Mukand failed to make the necessary link between the import duties paid and the rebate granted by the Indian government to justify its claim for duty drawback. See Mukand Preliminary Analysis Memorandum at page 4. Accordingly, the Department denied Mukand's duty drawback claim. There is no information on the record in this review since verification which contradicts this preliminary result. Further, the Department has previously denied a respondent's request to offset its costs by the amount of duty drawback received after the Department denied the respondent its duty drawback adjustment. See Top-of-the-Stove Stainless Steel Cooking Ware from the Republic of Korea: Final Results and Rescission, in Part, of Antidumping Duty Administrative Review, 68 FR 7503 (February 14, 2003) and accompanying Issues and Decision Memorandum at Comment 4 ("Cooking Ware from Korea"); Polyester Staple Fiber From Korea: Final Results of Administrative Review, 67 FR 63616 (October 15, 2002), and accompanying Issues and Decision Memorandum at Comment 6. Additionally, section 772(c)(1)(B) of the Act specifically provides that duty drawback is to be used as an adjustment to export price or constructed export price. Because Mukand did not establish that it is entitled to the duty drawback adjustment, the Department will not offset Mukand's COP or constructed value ("CV"), as a fall back equivalent adjustment with these import duties. Accordingly, here the Department decided that it would not be appropriate to reduce COP, which is used for testing whether home market sales were made at or below cost prices, because the duties were not rebated on those sales. Similarly, the duty must be included in CV, since the EP or CEP would be increased for duty drawback received on export sales. The CV must therefore include the duties as the drawback would otherwise be double-counted, if the respondent qualified for a duty drawback. See Cooking Ware from Korea; Notice of Final Determination of Sales at Less Than Fair Value: Certain Polyester Staple Fiber From the Republic of Korea, 65 FR 16880 (March 20, 2000) and accompanying Issues and Decision Memorandum at Comment 16.

Comment 8: Packing Costs

Petitioner alleges that the Department erred in the Preliminary Results margin calculation

program by incorrectly calculating Mukand's U.S. packing costs by converting the packing variable ("PACKINGU/PACKU") from Indian rupees to dollars in its margin calculation program. Petitioner also argues that the Department inadvertently included the variable PACKINGU, rather than PACKU, in its calculation of total constructed value ("TOTCV") in the preliminary margin calculation program, thus understating TOTCV and Mukand's dumping margin. Further, petitioner contends that the Department understated the foreign unit price in dollars ("FUPDOL") by converting the variable PACKINGU from dollars to rupees.

Respondent did not file a rebuttal to this comment.

Department's Position: We agree with petitioner. In the Preliminary Results, the Department inadvertently converted Mukand's U.S. packing costs from a Indian rupee denominated variable to a U.S. dollar variable, thus altering the TOTCV and FUPDOL calculations. For the final results, the Department has corrected the margin calculation program to define the variable PACKINGU = PACKU. Thus, by correcting the packing variables mentioned above, the use of the variable PACKINGU in the calculation of TOTCV and FUPDOL is correct. For a further discussion, see Mukand's Final Analysis Memorandum.

C. Issues with Respect to The Viraj Group

Comment 9: The Viraj Group's Cost Data

Petitioner argues that the Department should apply adverse facts available to the Viraj Group because the Viraj Group's reported cost data are deficient and inaccurate. Petitioner contends that the Viraj Group failed to provide complete and accurate cost reconciliations in a timely manner in the form requested by the Department, and that they did not properly allocate costs based on all physical characteristics of the product.

Petitioner argues that the Viraj Group did not reconcile the reported per-unit direct material costs and total manufacturing costs with the company's audited financial statements. Petitioner also contends that the respondent's cost reconciliation between the Viraj Group's books and records and the Viraj Group's reported per-unit labor and overhead costs do not match. Petitioner maintains that because of these deficiencies, the Viraj Group's reconciliation is not complete and not in the form or manner requested by the Department.

Petitioner argues that because the reconciliation is not properly done, the Department has no basis to accept the Viraj Group's reported cost data, and therefore should apply adverse facts available to the Viraj Group for the final results. Petitioner notes that the Department applied adverse facts available to Panchmahal when it failed to reconcile and demonstrate the link between its financial statements and its POR per-unit costs. Petitioner contends that the Viraj Group, like Panchmahal, failed to reconcile manufacturing costs and also failed to demonstrate the link between its books and records and its POR cost information. Therefore, petitioner argues that the Department should apply adverse facts available to the Viraj Group for the final results.

Additionally, petitioner argues that the Viraj Group failed to properly allocate costs based on all physical characteristics of the subject merchandise. Petitioner notes that the Viraj Group submitted completely new Section D cost of production COP and CV data on December 16, 2002, in response to petitioner's complaints regarding cost differences for different sizes of wire rods. Petitioner contends that a comparison of the Viraj Group's cost data submitted December 16, 2002, to cost data submitted December 2, 2002, shows substantial differences that the Viraj Group has not explained. Petitioner maintains that these inconsistencies in reported costs, along with the Viraj Group's failure to provide cost reconciliations, raise serious questions as to the reliability of the Viraj Group's cost data, and demonstrates that the Viraj Group has not cooperated fully and to the best of its ability with the Department.

Further, petitioner argues that because the Viraj Group has significantly impeded this proceeding, the Department is required to resort to facts available under section 776(a)(2)(C) of the Act. Furthermore, petitioner contends that the Viraj Group has not satisfied the requirements of section 782(d)(4) of the Act in that it "has not acted to the best of its ability in providing the information {i.e., cost reconciliation} and meeting the requirements established" by the Department. Petitioner maintains that pursuant to section 776(b) of the Act, which permits the Department to use an inference adverse to the party's interests where the party has not cooperated to the best of its ability, adverse facts available should be applied to the Viraj Group. Finally, petitioner argues that the Department should ensure that the Viraj Group does not obtain a more favorable result by failing to cooperate, than it would if it had cooperated, by applying the "all others" rate of 48.80 percent.

The Viraj Group argues that its cost data is reliable. The Viraj Group contends that the Department has verified its data many times in the past and always found it to be correct. The Viraj Group maintains that it has provided all reconciliation data requested by the Department, and its submissions are full and complete. The Viraj Group argues that the differences in its reported revised cost data are based on differences in the diameter of the stainless steel wire rods. Finally, the Viraj Group further contends that petitioner's allegations of inconsistency are based on data submitted by the Viraj Group for steel flanges, not stainless steel wire rods.

Department's Position: We disagree with petitioner. The Department has determined that the Viraj Group provided an adequate cost reconciliation to the Department by providing relevant documentation, demonstrating its per-unit calculations, and explaining its methodology for reporting its per-unit costs. See the Viraj Group's April 8, 2002 Section D questionnaire response ("April 8, 2002 Section D response") and October 7, 2002 Sections A through D Supplemental questionnaire response ("October 7, 2002 Sections A-D response").

The Department notes that Panchmahal's deficient cost reconciliation is based on the fact that they have never explained how they calculated per-unit cost from their accounting system. However, the Viraj Group has provided an explanation how they calculated per-unit cost from their accounting system and the supporting documentation for its cost reconciliation. First, the Viraj Group provided financial statements which covered the POR. Second, the Viraj Group provided relevant trial balances which tied to their financial statements. Additionally, we then tied the trial balances to worksheets which showed the per-unit cost calculations for the Viraj Group. Finally, the Viraj Group also provided

an explanation for the methodology they used to extract the per-unit costs from their financial statements. Accordingly, the Department has determined that the Viraj Group's explanation and accompanying documentation are an adequate cost reconciliation.

The Department disagrees with petitioner's argument that the differences between the Viraj Group's reported cost data in the December 2 and December 16, 2002 submissions raises questions about the reliability of the Viraj Group's information. First, the Viraj Group provided sufficient explanation to the Department's questions about differences in data. For instance, in a supplemental questionnaire the Department requested that the Viraj Group explain whether differences in the diameter of wire rods affect the cost of production. See November 18, 2002 Department Supplemental Questionnaire. The Viraj Group responded that the costs for different sizes of wire rods within the same grade are identical. See the Viraj Group's December 2, 2002 Supplemental questionnaire response ("December 2, 2002 response") at page 2. The Viraj Group then submitted a revised cost database and explained that based on "best management estimates" from production people within the Viraj Group, labor costs might differ between wire rods with different diameters. See the Viraj Group's December 16, 2002 submission ("December 16, 2002 submission") at page 2. The Viraj Group further explained that these potential cost differences based on diameter are not tracked in the ordinary course of business for the Viraj Group.

Second, the Department noted that the control numbers ("CONNUM") in the data set submitted in the December 16, 2002 submission did not match the existing CONNUM's in the Viraj Group's cost and sales databases submitted previously. Specifically, the revised CONNUM's contained extra numerals and decimal points. Furthermore, the differences in cost were minimal, with a small impact on the total cost.

The Department also disagrees with petitioner's argument that differences between the total per-CONNUM costs for material, labor, and overhead, derived from the Viraj Group's cost database and the costs reported in its financial statement demonstrates that the Viraj Group has failed to provide a reconciliation. Evidence on the record indicates that differences between the total per-CONNUM costs and the costs reported in the Viraj Group's financial statements is likely the result of the Viraj Group producing non-subject merchandise. For example, the Viraj Group's questionnaire response shows that the Viraj Group produced five other products besides subject merchandise during the POR. See the Viraj Group's February 26, 2002 Section A response at 2. In turn, the non-subject merchandise produced by the Viraj Group may have different production processes requiring higher or lower costs, which results in a problematic comparison between the Viraj Group's financial statements and its total per-CONNUM costs reported for the current review. For these reasons, the Department does not find that the minor differences in the Viraj Group's December 2, 2002 response and December 16, 2002 submission raise reliability questions about this data. Furthermore, the Department determined not to use the December 16th data in its preliminary results.

As explained above, the cost reconciliation provided, in addition to the explanation of the methodology used, is adequate to trace per-unit costs to the Viraj Groups financial statements. For these reasons the Viraj Group has cooperated with the Department in providing an adequate cost reconciliation. Therefore, the Department has determined that the issue of facts available with regards

to the Viraj Group's reconciliation is not germane to this proceeding, and the Department will not pursue an adverse facts available finding in this proceeding.

Comment 10: Collapsing the Viraj Group

Petitioner argues that the Department improperly determined that the three Indian companies comprising the Viraj Group, Viraj Alloys, Ltd. ("VAL"), Viraj Impoexpo, Ltd. ("VIL") and Viraj Forging, Ltd. ("VFL"), should be collapsed and considered as one entity. Petitioner asserts that the evidence on the record does not support a finding that these companies comprise one entity. Petitioner maintains that the Department misinterpreted the meaning of section 351.401(f)(1) of the Department's regulations. Petitioner further contends that the Department improperly and without adequate justification reversed its earlier decision not to collapse the Viraj entities.

Petitioner argues that because substantial retooling would be necessary to either VAL's, VIL's, or VFL's production facilities in order for these entities to produce similar or identical merchandise covered by the dumping order, these entities cannot be properly collapsed under section 351.401(f)(1) of the Department's regulations. Petitioner contends that the record shows that the production facilities of VAL are significantly different from those of VIL and VFL. Petitioner notes that of the three companies comprising the Viraj Group, only VAL has the capacity to melt steel and make billets, while VIL and VFL's facilities are only capable of annealing and pickling wire rods made by a subcontractor. Due to the fact that only VAL has the capability to make the primary production input for the SSWR (*i.e.*, billets), petitioner maintains, the Viraj entities cannot be collapsed into one group.

Petitioner argues that the Department disregarded its own procedures by reversing, without adequate justification, an earlier 1997-98 administrative review determination not to collapse the Viraj Group companies, a determination that was upheld by the Court of International Trade ("CIT"). See Viraj Group, Ltd. v. United States, 162 F. Supp. 2d 656, 670 (CIT 2001) (stating that "the production facilities necessary to manufacture the diverse products were sufficiently different and therefore would require substantial retooling in order to restructure manufacturing priorities"). Petitioner emphasizes that in the 1997-98 review, the CIT characterized the business relationship of VAL and VIL as "limited to that of manufacturer and supplier despite their affiliated status," a relationship that petitioner argues has not changed in the current administrative review. See id. at 671. Petitioner argues that there are no meaningful factual differences between the 1997-98 review and either the 1999-2000 review or the current review, to justify a different outcome to the collapsing analysis.

Petitioner argues that the Department is disregarding its own procedures and "the well-established principle that an agency cannot change its mind without adequate justification" by noting in the present case only the Department's 1999-2000 review determination to collapse the Viraj Group, and not the 1997-98 POR determination, which was judicially tested and affirmed, where the Department determined not to collapse the Viraj entities. Petitioner contends that there were no meaningful factual differences in the positions of the parties during these review periods, and therefore the Department erred in not coming to a consistent conclusion.

Petitioner cites two cases as authority for the proposition that courts do not allow an agency to change its practice when the facts of the situation have not changed. Petitioner argues that in Tung

Mung Dev. Co. v. United States, the court remanded a determination back to the Department for an explanation of its change in practice because the court found that the Department's rationale in this case was not "consistent with the agency's prior position on identical facts." See Tung Mung Dev. Co. v. United States, 25 CIT 1059, Slip Op. 01-83 at 31-32. Petitioner maintains that in Cultivos Miramonte S.A. v. United States, the court refused to sustain the Department's explanation of its change in practice from one administrative review to the next, when it determined that the Department's explanation was not supported by substantial evidence and not adequately based on factual changes in the case. See Cultivos Miramonte S.A. v. United States, 980 F. Supp. 1268 (CIT 1997). Petitioner argues that there is virtually no distinction between the cases cited above, and the current case. Petitioner also contends that these cases show that the court holds the Department to a de facto higher standard when it changes its practice without a change in factual circumstances. Therefore, petitioner argues that the Viraj entities should not be collapsed, and the Department should use the highest of market, transfer, or COP of the input in its final calculations.

The Viraj Group argues that the Department's decision to collapse VAL, VIL, and VFL is correct. The Viraj Group maintains that VAL, VIL, and VFL are affiliated under section 771(33) of the Act and note that Mr. N. R. Kochhar and Mr. Nitán Chhatwal: (1) are family members; (2) are directors of all three of the Viraj Group companies; (3) hold over five percent voting stock in VAL, VIL, and VFL; and (4) run all three companies, making decisions for VAL, VIL, and VFL as a group.

Furthermore, the Viraj Group argues that no retooling is necessary for the Viraj Group to produce subject merchandise because all three companies use a subcontractor to convert billets into wire rods. Respondent notes that the Department collapsed the Viraj Group companies in the 1999-2000 administrative review, using VAL's home market sales for dumping margin calculations, even though VIL was the only Viraj Group company that exported to the United States. Respondent also notes that the Department collapsed the Viraj Group companies for the stainless steel flanges and the stainless steel bar administrative reviews, both with review periods of February 1, 2000, to January 31, 2001.

Department's Position: The Department disagrees with petitioner that the decision to collapse the three Viraj companies in the Preliminary Results was incorrect. Petitioner's contention that the Department misinterpreted the meaning of section 351.401(f)(1) of the Department's regulations is incorrect. Petitioner's contention that VAL's, VIL's, and VFL's production facilities are significantly different and would require substantial retooling to produce similar or identical merchandise is off point. The record shows that all three entities do in fact produce subject merchandise using the exact same production facilities, e.g., those of the same unrelated subcontractor. This is sufficient to satisfy the first prong of the 19 CFR 351.401(f) collapsing analysis. See Stainless Steel Wire Rod From Sweden, Notice of Final Determination of Sales at Less Than Fair Value, 63 FR 40452-54 (July 29, 1998) ("SSWR from Sweden") (stating that where a company uses a tolling arrangement to produce subject merchandise, yet retains title to the merchandise at all times, that company is a producer of the subject merchandise under 19 CFR 351.401(h), and therefore satisfies the "no retooling" requirement of 19 CFR 351.401(f)). Thus, the issue of whether substantial retooling would be needed at the facilities of VAL, VFL, or VIL is rendered irrelevant in the instant review because VAL, VIL and VFL all

maintained full ownership of the material and control of the sale of the subject merchandise and all produce subject merchandise using the same subcontractor, which requires no retooling.

Additionally, the Department disagrees with petitioner that it is significant that VAL is the only one of the three companies able to make steel billets. VIL and VFL purchase steel billets from VAL, but it is not necessary for VIL and VFL to purchase steel billets from VAL in order for them to produce subject merchandise. VIL and VFL could purchase steel billets from another supplier and still produce subject merchandise.

Also, the Department disagrees with petitioner's contention that the Department disregarded its own procedures in coming to a different conclusion regarding collapsing in the present administrative review (and the 1999-2000 administrative review) than it had in the 1997-98 administrative review.³ The petitioner is wrong in stating that the Department cited no meaningful factual differences between the 1997-98 administrative review and the 1999-2000 administrative review that would justify a different conclusion to the collapsing analysis.

As petitioner notes, the CIT upheld the Department's decision not to collapse the Viraj companies in the 1997-98 administrative review. See Viraj Group, 162 F. Supp. 2d at 670. However, the Department has enumerated the factual changes that have taken place to distinguish the 1999-2000 administrative review, and therefore this administrative review, from the 1997-98 administrative review. See Stainless Steel Wire Rod from India: Final Results of Antidumping Duty Administrative Review, 67 FR 37391 (May 29, 2002) and accompanying Issues and Decision Memorandum at Comment 6. In the 1997-98 review only VIL was producing and shipping subject merchandise to the United States. See id. In the current administrative review, both VIL and VFL produce and ship subject merchandise to the U.S. During the 1997-98 administrative review, VAL and VFL did not produce subject merchandise. Based on this, the Department concluded that VAL and VIL could not be collapsed under section 351.401(f) of the Department's regulations. See Stainless Steel Wire Rod From India; Final Results of Antidumping Duty Administrative Review, 65 FR 31302 (May 17, 2000) and accompanying Issues and Decision Memorandum at Comment 6. In the instant review, both VAL and VFL produce subject merchandise. In the 1997-98 administrative review, VAL was not using the facilities of the subcontractor, and would therefore require extensive retooling to make subject merchandise. See id. In the instant review, VAL is using the facilities of a subcontractor to make subject merchandise. Finally, in the current administrative review, all three companies are producing identical or similar subject merchandise, using the production facilities of an unrelated subcontractor. Based on these factual differences, the Department determined that the three Viraj companies (i.e., VAL, VIL, and VFL) are properly collapsed under section 351.401(f) of the

³As petitioner points out, the Department's decision to collapse the three Viraj companies in the 2000-2001 administrative review is based on the same conclusion it reached in the 1999-2000 administrative review. The Department determined in the 2000-2001 administrative review that there were no operational or legal changes to the Viraj Group, and no factual changes with respect to the factors used to determine collapsing, to warrant any change to the collapsing analysis. See Preliminary Results.

Department's regulations. Therefore, petitioner's contention that the Department unjustifiably changed its disposition within the context of identical facts is unfounded.

Further, the Department disagrees with petitioner's contention that the court in Viraj Group determined that VAL and VIL are not affiliated. See Viraj Group Ltd. V. United States, 162 F. Supp. 2d 656, 669 (CIT 2001) ("Viraj Group"). Petitioner in its case brief claims "{t}he court further characterized the business relationship between VAL and VIL 'to be limited to that of manufacturer and supplier despite their affiliated status.'" See petitioner's Case Brief at 9 (quoting Viraj Group, 162 F. Supp. 2d 656, at 671). This is a misleading characterization of the court's disposition. At the point where petitioner extracted this quote, the court was considering the issue of inter-company transfer pricing. The court had already held that the Department had properly determined that the three Viraj companies should not be collapsed under 351.401(f). Therefore, the court did not have to, and in fact did not, reach any conclusion about the affiliated status of the three Viraj companies. What the court did say is that, because VAL and VIL were not collapsed into a single entity, and for purposes of the major input rule, their relationship "appears to be limited to that of manufacturer and supplier." Id. At no point does the court hold that VAL and VIL are not affiliated. In fact, the court makes clear that the discussion proceeds "despite their {i.e., VAL and VIL's} affiliated status." Id.

Finally, the Department agrees with respondent that the three companies of the Viraj Group are affiliated and were properly collapsed. In order for the Department to consider VAL, VIL, and VFL as one entity, we must find that the producers are affiliated under section 771(33) of the Act, and that the "producers have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities and the Secretary concludes that there is a significant potential for the manipulation of price or production." See section 351.401(f) of the Department's regulations. The Department has found that VAL, VIL, and VFL are affiliated based on the evidence on the record which states that Mr. Chhatwal and Mr. Kochhar are the directors for all three companies, they jointly run all three companies, and their decisions are made for the interest of the group as a whole. Furthermore, the stock of VAL, VIL and VFL is mainly held by Mr. Chhatwal, Mr. Kochhar, and their relatives. Collectively, this group holds a large percentage of the shares in VAL, VIL, and VFL. As discussed supra, the Department has determined that VAL, VIL, and VFL all produce similar or identical subject merchandise, and require no retooling to restructure manufacturing priorities. Additionally, the Viraj Group's legal and corporate structure has not changed from the last administrative review. Thus, the Department concludes, based on these considerations, that VAL, VIL, and VFL are capable of manipulating prices and production decisions. Therefore, the Department will not make any changes on this issue for the final results of review.

Comment 11: Financial Expenses

Respondent argues that the Department improperly added certain expenses to the Viraj Group's interest expenses ("INTEX2"). The Viraj Group claims that these certain expenses were properly reported as U.S. credit expenses ("CREDITU"), and that adding these expenses to interest expenses resulted in double counting. The Viraj Group also argues that the Department erred in counting the total interest expenses of VAL, because VAL is undergoing financial reconstruction and

will not be required to pay back all of its interest.

The Viraj Group states that it provides credit to its customers for agreed terms of payment, while at the same time borrowing money from the Viraj Group's bank against the customer's invoice. Respondent explains, therefore, that it pays interest to its bank for this borrowed money which covers the period of time between when the customer pays the bank and the bank pays the Viraj Group for the sale. The Viraj Group argues that this is real interest being paid, and that this interest is included as "Interest Usance-Exports" in the total interest cost in its financial statements.

Respondent also states that it separately reported the credit expenses which accrued for the days between the date of payment and the bill of lading date, at the rate specified by the Department at which U.S. dollars can be borrowed for short-term. Respondent contends that if the Department adds the Interest Expenses "Interest Usance-Exports" back to the total interest in CV, the interest accrued and paid by the Viraj Group is counted twice in the dumping margin calculation.

Respondent argues that if credit expenses are reduced from U.S. price, then the Interest Usance Cost incurred by the Viraj Group for giving credit to customers should not be added to the total Interest Expenses in section D for calculating the dumping margin.

Further, the Viraj Group contends that the Department incorrectly added total interest expenses of VAL in the calculation of Net Interest Expense because VAL claims it has been declared a "sick company," is under financial reconstruction, and will not have to pay the full amount of this interest, as per Reserve Bank of India guidelines. Lastly, respondent argues that because this interest cost was not paid, and is now waived, it should not be included in the calculation of the dumping margin.

Petitioner argues that the Department acted properly in including the imputed credit expenses that the Viraj Group deducted, as well as VAL's interest expenses. Petitioner notes that the Department addressed these issues in the Preliminary Results, where the Department stated that it adjusted the Viraj Group's financial expenses to include all interest expenses reported in the respondent's audited financial statements.

Petitioner argues that the Department's recalculation of VFL and VIL's interest expenses was proper because these companies claimed that certain interest expenses excluded by them in their calculation of interest expense for cost of production were included in the imputed credit expense variables in the sales databases CREDITH and CREDITU. Petitioner notes that the Department's policy, as explained on page D-13 of the Department's January 29, 2002 questionnaire, only allows a party to reduce interest expense incurred by the amount of interest income earned on short term investments of the party's working capital. Petitioner argues that imputed credit expenses associated with accounts receivable should not be deducted from total expenses when calculating net interest expenses because it does not represent actual income earned by the company.

Petitioner argues, similarly, that the Department acted properly in including the interest expenses incurred by VAL because these expenses, recorded in the respondent's audited financial statements, were actual expenses incurred by VAL, not income earned on working capital. Further, petitioner argues that the letter offered by respondent as proof of VAL's financial reconstruction was submitted late, and that regardless of this letter, the expenses in question were recorded during the relevant fiscal year and therefore correctly included in the total interest expense calculation.

Department's Position: We disagree with respondent. The Department's practice is to deduct an amount for imputed credit, a direct expense, from CEP and home market price. See section 351.410(c) of the Department's regulations. Credit expense, which is usually imputed, reflects the interest cost incurred by producers/sellers between the date of shipment and the date of payment. See Original Questionnaire at page I-4. Actual interest expenses incurred are used for the build-up of net interest expenses to obtain the interest expense ratio used to calculate CV. We adjust NV, including NV that is based on CV, by the amount of any difference in direct selling expenses, including imputed credit expenses, between foreign market sales and U.S. sales. Accordingly, because there were no U.S. credit expenses in CEP after these were deducted from CEP, we deducted from CV an amount for HM credit expenses. Therefore, we have fully accounted for differences in credit expenses between the two markets.

For the final results, the Department deducted only an imputed credit amount from both home market price and CEP, and did not deduct the interest amount, discussed above, from the Viraj Group's interest expense build-up.

Comment 12: Raw Material Cost

The Viraj Group argues that the Department improperly calculated the Viraj Group's U.S. net price. The Viraj Group contends that the amount that it must pay for raw materials on importation is reduced through use of India's Duty Entitlement Passbook ("DEPB") certificates. The Viraj Group argues that this amount should be deducted from the actual raw material cost incurred by VAL.

Petitioner argues that the Department properly excluded the duty drawback adjustment. Petitioner points out that the Viraj Group failed to show that the import duty paid and the duty drawback adjustment were directly linked, as required in part one of the Department's two prong test. Petitioner notes that the Department denied this adjustment in the previous administrative review as well, and this decision was upheld by the CIT. See Viraj Group.

Petitioner further argues that if the Viraj Group's position is that the drawback should be deducted from raw material costs, the Department acted correctly in not allowing the cost deduction. Petitioner contends that the Department's rejection of duty drawback as a price adjustment does not justify its inappropriate inclusion as an adjustment to cost.

Department's Position: We disagree with respondent. As explained in the Preliminary Results, in the previous administrative review, the Department denied the Viraj Group's request for an upward adjustment to the U.S. starting price based on duty drawback pursuant to section 772(c)(1)(B) of the Act.

In this proceeding, the Department finds that the Viraj Group has not provided substantial evidence on the record to establish the necessary link between the import duty and the reported rebate for duty drawback. The Viraj Group has reported that it received duty drawback in the form of duty entitlement certificates which are issued by the Government of India to neutralize the incidence of basic custom duty on the import of raw materials used in the production of subject merchandise, but has failed to establish the necessary link between the import duty paid and the rebate given by the

Government of India. Thus, the Viraj Group was not able to demonstrate that the import duty paid and the duty drawback rebate were directly linked. See Preliminary Results.

Further, the Department has previously denied a respondent's request to offset its costs by the amount of duty drawback received after the Department denied the respondent its duty drawback adjustment. See Cooking Ware from Korea. Therefore, the Department did not offset the Viraj Group's raw material cost with these import duties.

Comment 13: Non-Dumped Sales

The Viraj Group argues that the Department improperly treated negative dumping margins as zero percent margins in the dumping margin calculations for the Preliminary Results. The Viraj Group contends that this led to a distorted average. Respondent states that the WTO Anti-Dumping Code requires (a) fair comparisons as to dumping margin calculations and (b) that averaging be done on the basis of the positive and negative margins during the POR without just considering more heavily, in a biased and one-sided way, the positive dumping margins. Respondent argues that the WTO panel decision in EC-Bed Linen found that the "zeroing" of dumping margins, such as that done by the Department in the present review, is contrary to the WTO code explained above. See European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India, WT/DS141/R, para. 6.116 (October 30, 2001) ("EC-Bed Linen").

Petitioner argues that the Department acted both within its statutory obligations under the Act and reasonably in treating negative dumping margins as zero percentages in its calculations. Petitioner contends that the Department has found that the EC-Bed Linen decision does not apply to U.S. proceedings. See Certain Preserved Mushrooms from India: Final Results of Antidumping Duty Administrative Review, 66 FR 42,507 (Aug. 13, 2001) ("Mushrooms from India") (where the Department determined that because the U.S. was not a party to the EC-Bed Linen dispute, the U.S. has no WTO duty to act in conformance with the decision reached, and can continue the practice of zeroing negative dumping margins).

Petitioner contends that the Uruguay Round Agreements Act was intended to bring United States law into compliance with the United States' obligations under the Uruguay Round Agreements. Petitioner argues that the Uruguay Round Agreements Act ("URAA"), Statement of Administrative Action ("SAA"), the "authoritative expression" of the United States concerning the application of the Uruguay Round Agreement ("URA"), shows no intent that the URA would change U.S. policy regarding the zeroing of negative margins. Petitioner contends that the SAA and the statute are silent regarding the DOC's zeroing methodology, and therefore did not change U.S. law regarding zeroing of negative margins. Therefore, the practice is a reasonable application of the statute. See SAA, H.R. Doc. No. 103-316(I) (1994) at 669; Bowe Passat Reinigungs-Und Waschereitechnik GmbH v. United States, 20 CIT 558, 572, 926 F. Supp. 1138, 1150, remanded, 951 F. Supp. 231 (CIT 1996), aff'd, 980 F. Supp. 1262 (CIT 1997) ("Bowe Passat").

Petitioner notes that prior to enactment of the URAA, the Department calculated dumping margins in original investigations by comparing the weighted average home market price to each individual exported price. Petitioner alleges that the Department changed its practice in order to

comply with the WTO Antidumping Agreement, and now calculates dumping margins by comparing the weighted average of normal values to the weighted average of export prices of comparable merchandise. Additionally, in compliance with the URAA, petitioner notes that the U.S. codified a new provision defining “dumping margin” and “weighted average dumping margin.” Section 771(35)(A) of the Act defines “dumping margin” as “the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise,” Section 771(B) of the Act defines “weighted average dumping margin” as “the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer.”

Petitioner contends that section 771(35)(A) indicates that an item is dumped only if its normal value exceeds its export or constructed price. Petitioner maintains that if export or constructed export price are not greater than normal value, then no dumping has occurred, and the non-dumped transaction should not be used to mask dumping that has occurred in other transactions. Petitioners point out, however, that under 771(33)(B), the weighted average dumping margin is calculated using all sales, including the non-dumped transactions. Petitioner claims that this is a reasonable means of establishing the dumping margin, in accordance with the court’s holding in Bowe Passat. See Bowe Passat.

Furthermore, petitioner argues that WTO decisions have no binding effect on non parties (see SAA, H.R. Doc. No. 103-316(I) (1994) at 1032), and that the doctrine of stare decisis is not applicable in international trade law. See Statute of the International Court of Justice, Art. 59 at 14, 59 Stat. 1055, 1062 (June 26, 1945). Petitioner also contends that the ministerial body of the WTO is the only body that can interpret an Appellate Body report (see SAA, H.R. Doc. No. 103-316(I) (1994) at 662). Petitioner further maintains that the methodology used by the EC in EC-Bed Linen may be different from that used by the Department. Petitioner argues that there is a significant and important difference between U.S. and European practices. Petitioner contends that in U.S. original investigations, the Department initially calculates only a cash deposit rate, based on an estimate of future margins, and that it is only after an administrative review that actual dumping duties are imposed. Petitioner contends that EU methodology, by contrast, applies actual dumping duties prospectively, without the opportunity for further review. Petitioner argues that, because of these differences in methodology, it would be inappropriate to apply the holding reached in EC- Bed Linen to U.S. dumping margin calculation practice.

Petitioner argues that the Department’s methodology is a reasonable application of U.S. dumping law in accordance with international obligations. Petitioner notes that the CIT has found the Department’s methodology to be reasonable. See Bowe Passat, (stating that “[u]nless and until it becomes clear that such a practice {i.e., zeroing} is impermissible or unreasonable. . . the Court must defer to Commerce’s chosen methodology”). Petitioner argues that the court in Bowe Passat, on facts similar to this case, declined to invalidate the Department’s methodology because it prevented respondents from masking dumping. Petitioner further contends that if the negative margins in the instant case were not zeroed, the positive dumping that occurred would be undetected, and the dumped sales would continue to injure U.S. producers.

Department's Position: We agree with petitioner and we have not changed our calculation of the weighted-average dumping margin as suggested by the respondent for these final results. As we have discussed in prior cases, our methodology is consistent with our statutory obligations. See e.g., Notice of Final Results of Antidumping Duty Administrative Review: Stainless Steel Sheet and Strip in Coils from Japan, 67 FR 6495, (February 12, 2002), and accompanying Issues and Decision Memorandum at Comment 1; Notice of Final Determination of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands, 66 FR 50408 (October 3, 2001), and accompanying Issues and Decision Memorandum at Comment 1. The Department includes sales that did not fall below normal value in the weighted-average margin calculation as sales with no dumping margin. The total value of such sales is included in the denominator of the weighted-average margin along with the value of dumped sales. However, we do not permit sales that did not fall below normal value to cancel out dumping margins found on other sales.

The Act requires the Department to employ this methodology. Section 771(35)(A) of the Act defines “dumping margin” as “the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise.” Section 771(35)(B) of the Act defines “weighted-average dumping margin” as “the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer.” Taken together, these sections direct the Department to aggregate all individual dumping margins, each of which is determined by the amount by which normal value exceeds export price or constructed export price, and to divide this amount by the value of all sales. The directive to determine the “aggregate dumping margins” in section 771(35)(B) makes clear that the singular “dumping margin” in section 771(35)(A) applies on a comparison-specific level, and does not itself apply on an aggregate basis. At no stage in this process is the amount by which EP or CEP exceeds normal value on sales that did not fall below normal value permitted to cancel out the dumping margins found on other sales. This does not mean, however, that sales that did not fall below normal value are ignored in calculating the weighted-average rate. It is important to note that the weighted-average margin will reflect any “non-dumped” merchandise examined during the investigation, the value of such sales is included in the denominator of the dumping rate, while no dumping amount for “non-dumped” merchandise is included in the numerator. Thus, a greater amount of “non-dumped” merchandise results in a lower weighted-average margin.

This is a reasonable means of establishing duty deposit rates in investigations and assessing duties in reviews. In an administrative review, the deposit rate calculated for future entries must reflect the fact that the U.S. Bureau of Customs and Border Protection (“BCBP”) is not in a position to know which entries of merchandise entered after the close of the present review period are dumped and which are not. By spreading the estimated liability for dumped sales across all reviewed sales, the weighted-average dumping margin allows the BCBP to apply this rate to all merchandise entered after the close of the review period.

Finally, with respect to respondent's WTO-specific arguments, we note that U.S. law, as implemented through the URAA, is fully consistent with our WTO obligations. In addition, the EC-Bed Linens Panel and Appellate Body decisions concerned a dispute between the European Union and India. The Department is not obligated under the WTO to act in accordance with these decisions

because this dispute did not involve the United States. See Mushrooms from India. Accordingly, the Department will continue to apply our margin calculation methodology.

Comment 14: Ministerial Error

Petitioner alleges that the Department inadvertently failed to revise variable cost of manufacture (“VCOMH/U”) and total cost of manufacture (“TCOMU”) in the model match program and total cost of manufacture (“TOTCOM”) in the margin program. Petitioner contends that this revision should be made to reflect the Department’s revaluation of the direct materials produced by VAL and sold to VIL and VFL, using actual material costs to VAL.

The Viraj Group did not rebut this comment.

Department’s Position: We agree with petitioner and have revised the model match and margin programs for the final results. See the Viraj Group’s Final Analysis Memorandum dated May 8, 2003.

RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting all of the above positions and adjusting all related model match and margin calculations accordingly. If these recommendations are accepted, we will publish the final results of review and the final weighted-average dumping margins for all reviewed firms in the Federal Register.

AGREE_____

DISAGREE_____

DISCUSS_____

Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

Date